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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA,

Petitioner,

v.

CY JAMISON, Director of the Bureau of Land Management, Department of Interior; BILLY R. TEMPLETON, Nevada State Director, Bureau of Land Management, Department of Interior,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE OF NEVADA,
Plaintiff-Appellant,

v.

ROBERT F. BURFORD, Director of Bureau of Land Management, Department of Interior; EDWARD F. SPANG, Nevada State Director, Bureau of Land Management, Department of Interior,
Defendants-Appellees.

No. 89-15272
D.C. No. CV-88-0203-PMP
OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
August 16, 1990—San Francisco, California

Filed November 14, 1990

Before: J. Clifford Wallace, Arthur L. Alarcon and Charles Wiggins, Circuit Judges.

Opinion by Judge Wallace

SUMMARY

Constitutional Law/Jurisdiction

Affirming a district court dismissal of an action for lack of standing, the court of appeals held that Nevada failed to show

how a grant of a right-of-way by the Bureau of Land Management to the Department of Energy to conduct site characterization studies at Yucca Mountain for the repository of nuclear waste caused it injury in fact to challenge that action.

Under the Waste Act, the Department of Energy obtained a right-of-way over public land near Yucca Mountain in the State of Nevada from the Bureau of Land Management to evaluate the suitability of a site for the location of a repository for nuclear waste. The right-of-way granted prohibited the disposal of any hazardous materials on the land, and stated that it did not convey any rights for the construction or initial operation of a nuclear waste repository. The district court dismissed Nevada's action to challenge the grant of the right-of-way for lack of standing. The district court also concluded that Nevada's constitutional claims were without merit.

[1] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the threshold question of standing in every federal case. To clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. [2] Nevada's complaint was silent as to how the alleged violations resulted in injury to Nevada. The federal government owned the land in question. In addition, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada failed to show how those violations resulted in injury to that state. Nevada's asserted right to have the federal government act in accordance with law was not sufficient, standing alone, to confer jurisdiction on a federal court. [3] Nevada's claim of standing on the basis of its sovereign interest failed. Clearly, the right-of-way decision did not strip Nevada of its right to participate in the site characterization process or to object to the selection of Yucca Mountain as a repository. [4] Nevada's asserted proprietary interest as a basis for standing also failed. Even assuming that the site characterization process would disturb the land,

Nevada failed to show that it would suffer on account of that disturbance. [5] Nevada could also not seek standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has stated clearly that a state does not have standing as *parens patriae* to bring an action against the federal government. [6] Because Nevada failed to allege sufficient facts to demonstrate standing, the district court properly dismissed its action. The court did not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

COUNSEL

Harry W. Swainston, Deputy Attorney General, Carson City, Nevada, for the plaintiff-appellant.

George W. Vancleve, United States Department of Justice, Washington, D.C., for the defendant-appellee.

OPINION

WALLACE, Circuit Judge:

Nevada appeals from the dismissal of its complaint against the Bureau of Land Management (Bureau), in which Nevada alleges that the Bureau improperly granted a right-of-way to the Department of Energy (Department) to conduct site characterization studies at Yucca Mountain, Nevada. The district court concluded that Nevada lacked standing to pursue this action, and dismissed the complaint. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Our court has no jurisdiction to review a dismissed complaint; a judgment is not final until the underlying action is dismissed. Where the district court has inadvertently neglected to dismiss the action but it is clear it intended its order to terminate the

action, we treat the action as dismissed. *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 855-56 (9th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987). Here it is clear that the ruling by the district court was meant to be dispositive of the action. Therefore, we have jurisdiction over this timely appeal under 28 U.S.C. § 1291. We affirm.

I

In February of 1983, Nevada was notified that certain public lands near Yucca Mountain were under consideration as a national repository for the disposal of nuclear waste. Four years later, Congress decided to concentrate waste repository development efforts on the Yucca Mountain site. Accordingly, Congress amended the Nuclear Waste Policy Act (Waste Act), 42 U.S.C. §§ 10101-10270, to require that site characterization activities proceed solely at Yucca Mountain. *Id.* § 10133(a). Site characterization consists of extensive testing conducted by the Department in order to evaluate the suitability of a site for the location of a repository. *Id.* § 10101(21).

In order to aid the Department in its site characterization activities, the Waste Act provides,

> [t]o the extent that the taking of any action related to the site characterization of a site . . . requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer shall issue or grant any such authorization at the earliest practicable date, to the extent permitted by the applicable provisions of law administered by such agency or officer.

42 U.S.C. § 10140(1) (emphasis added). Pursuant to this section, the Department applied to the Bureau in November 1987 for a right-of-way over public land near Yucca Mountain. This land is administered by the Bureau under the Fed-

eral Land Policy and Management Act of 1976 (Land Act), 43 U.S.C. §§ 1701-1784 which directs the Bureau to manage the land in a way "that will best meet the present and future needs of the American people." *Id.* § 1702(c). On January 6, 1988, the Bureau granted to the Department a 13 year right-of-way over 51,632 public acres near Yucca Mountain, and authorized the Department to undertake necessary site characterization activities on that land in accordance with the Department's Plan of Development.

Under this plan, the Department intends to excavate several exploratory shafts and conduct a variety of scientific tests. The Department has stated that site characterization activities should not interfere with any current or planned activities on the lands within the right-of-way. It promises "to return lands disturbed by site characterization to a stable ecological state with a form and productivity similar to the predisturbance state." Moreover, the right-of-way granted by the Bureau prohibits the disposal of any hazardous materials on the land, and states that it "does not convey any rights for the construction or initial operation of a nuclear waste repository."

Nevada filed an action in the district court challenging the grant of this right-of-way. Nevada alleged that the grant violated requirements in both the Land Act and the National Environmental Policy Act (Environmental Act). In addition, it claimed that the Bureau's actions violated Nevada's constitutional right, including that the right-of-way rendered meaningless Nevada's political right to object to its selection as a waste repository site. The district court determined that Nevada lacked standing to pursue the action, and concluded that the constitutional claims were without merit.

II

We review de novo the district court's legal conclusion that Nevada lacks standing. *Bruce v. United States*, 759 F.2d 755,

758 (9th Cir. 1985), *cert. denied*, 479 U.S. 987 (1986). Moreover, for purposes of this review, we must construe the complaint in favor of Nevada, and accept as true all of Nevada's material allegations. *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

[1] The "case or controversy" limitation in article III of the Constitution requires that federal courts visit the "threshold question" of standing in every federal case. *Id.* at 498. In order to clear this jurisdictional hurdle, a complaining party must demonstrate an injury in fact. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 473 (1982) (*Valley Forge*). The Supreme Court has held that this constitutional injury requirement embraces three related elements: (1) an actual or threatened injury, (2) which is fairly traceable to the defendant's allegedly unlawful conduct, and (3) which is likely to be redressed by the relief requested. *See Allen v. Wright*, 468 U.S. 737, 751 (1984) (*Allen*); *Valley Forge*, 454 U.S. at 472; *Alaska Fish & Wildlife Federation v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988).

To satisfy the first of these requirements, Nevada must show that it "has been or will in fact be perceptibly harmed by" the decision of the Bureau to grant the right-of-way. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688 (1973). Thus, Nevada must demonstrate that it has suffered or will in fact suffer "concrete and immediate" injury on account of the right-of-way grant. *Rapid Transit Advocates, Inc. v. Southern California Rapid Transit District*, 752 F.2d 373, 378 (9th Cir. 1985). This it has failed to do.

Nevada's complaint contains allegations that the Bureau's decision to issue the right-of-way violated several constitutional and statutory provisions. For example, Nevada contends that the Bureau violated requirements of the Land Act by issuing the right-of-way because in order to permit the

Department to occupy the land surrounding Yucca Mountain, the Bureau was required to use the withdrawal procedure specified in 43 U.S.C. § 1714. Nevada further argues that the environmental assessment accepted by the Bureau in connection with the right-of-way grant is insufficient to satisfy the requirements imposed by the Environmental Act. In addition, Nevada contends that issuance of the right-of-way violates many constitutional provisions, including the tenth amendment.

[2] However, the complaint is silent as to how these alleged violations have resulted in injury to Nevada. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen,* 468 U.S. at 754; *see also Diamond v. Charles,* 476 U.S. 54, 62 (1986) ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."). The federal government, not Nevada, owns the land in question. Moreover, Nevada did not allege in its complaint that it uses the land surrounding Yucca Mountain for any purpose. Even assuming that the right-of-way grant violates the Land Act, the Environmental Act, and the Constitution, Nevada fails to show how those violations result in injury to Nevada. We agree with the district court that Nevada's claims merely "constitute a generalized grievance that the [Bureau] is not acting in a way in which [Nevada] maintains is in accordance" with federal laws. *Nevada v. Burford,* 708 F. Supp. 289, 295 (D. Nev. 1989) (*Burford*). This is insufficient to demonstrate standing. *See Allen,* 468 U.S. at 754; *Valley Forge,* 454 U.S. at 482-83; *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 223 n.13 (1974).

[3] In addition to contending that the right-of-way grant violated several federal statutes and the Constitution, Nevada asserts that its political right to object to its selection as the host for a nuclear waste repository has been rendered meaningless by the Bureau's action. It is clear that a state may

demonstrate standing by asserting an injury to a sovereign interest. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 601 (1982) (*Snapp*). What constitutes a state's sovereign interest is not free from doubt. *Id.* But in this appeal, we need not analyze its nature or parameters. Nevada argues that one of its sovereign interests — the right to object in the political arena to the selection of Yucca Mountain as a waste repository — has been infringed. Assuming such an identifiable sovereign interest, Nevada's argument ignores the fact that the decision of whether to construct the repository at Yucca Mountain is many years and numerous procedural hurdles away. For example, if the Department determines that Yucca Mountain is an appropriate site after site characterization is completed, the Department must hold public hearings near the site to receive comments regarding its suitability. 42 U.S.C. § 10134(a). Following this, the Department must make a recommendation to the President whether to construct the repository, who in turn must decide whether to recommend the site to Congress. *Id.* Within 60 days of the President's recommendation to Congress, the state in which the recommended site is located may file a notice of disapproval with Congress. *Id.* § 10136(b)(2). If such a notice is filed, the site selection is disapproved unless Congress passes a resolution as required by the Waste Act within 90 days. *Id.* § 10135(c). We deal here only with the decision by the Bureau to grant a right-of-way, the only "direct consequence [of which] is that the site characterization process will proceed to the next step in accordance with the [Waste Act]." *Burford*, 708 F. Supp. at 297. Any claim by Nevada that site characterization will inevitably lead to the designation of Yucca Mountain as a repository site is mere speculation, and "unadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 44 (1976). Clearly, the right-of-way decision has not stripped Nevada of its right to participate in the site characterization process or of its right to object to the selection of Yucca Mountain as a repository. Thus, because

Nevada has failed to show how it has been injured in this respect, its claim of standing based on its asserted sovereign interest fails.

[4] In its complaint, Nevada also alleges that the site characterization process will disturb the surface and subsurface of the land in the affected area, and will interfere with other possible uses of the land. A state may, of course, have standing to redress injuries to its proprietary interests, such as the interests arising from property ownership. *Snapp*, 458 U.S. at 602-03. As we have discussed above, however, Nevada does not own the affected property, nor has it alleged that it uses the property for any purpose. Thus, even assuming that the site characterization process will disturb the land, Nevada has failed to show that *it* will suffer on account of that disturbance. Proprietary standing is therefore not available to Nevada.

[5] Finally, Nevada alleges that it has standing in its *parens patriae* capacity to advance the interests of its citizens. The Supreme Court has held that a state has a "quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general," and can therefore sue to protect these interests through a *parens patriae* action. *Id.* at 607. In this case, Nevada alleges that the selection of Yucca Mountain as the site for a national waste repository will have a devastating effect on the state's vital tourist industry. Although the Supreme Court has endorsed *parens patriae* suits in general, it has also stated that "[a] State does not have standing as *parens patriae* to bring an action against the Federal Government." *Id.* at 610 n.16 (stating that with respect to the citizens' rights in relation to the federal government, "it is the United States, and not the State, which represents them as *parens patriae*"). Our earlier case of *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142, 1153 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975), must, of course, give way to the Supreme Court's clear statement in *Snapp*.

[6] Because Nevada has failed to allege sufficient facts to demonstrate standing, we affirm the district court's dismissal of the action. We therefore do not reach the question of whether the district court was correct in dismissing Nevada's claims on the merits.

AFFIRMED.

DISTRICT COURT'S CORRECTED ORDER

708 F. SUPP. 289 (D.NEV. 1989)

The STATE OF NEVADA, Plaintiff,

v.

Robert F. BURFORD, Director, Bureau of Land Management, Department of the Interior, Edward F. Spang, Nevada State Director, Bureau of Land Management, Department of the Interior, Defendants.

No. CV-S-88-203-PMP (RJJ).

United States District Court,

D. Nevada.

Jan. 27, 1989.

As Corrected March 9, 1989.

ORDER DISMISSING COMPLAINT

PRO, District Judge.

The State of Nevada filed a "Complaint for Mandamus, Injunctive and Declaratory Relief and for Judicial Review" (#1) on March 25, 1988. in which it seeks to overturn the Bureau of Land Management's ("BLM") decision to issue a

right-of-way reservation ("ROWR") which authorizes the Department of Energy ("DOE") to occupy, use and develop public lands near Yucca Mountain, in southwestern Nevada. Pursuant to the ROWR, DOE plans to study Yucca Mountain's characteristics as a possible site for a repository of high-level radioactive waste and spent nuclear fuel.

Nevada's Complaint alleges four causes of action. The first cause of action is a collection of claims, all of which seek this Court to rescind the BLM's issuance of the ROWR to the DOE. (#1, ¶¶ 1.1-1.18, at 1-8)[1] The second

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[1]The BLM focuses on the gravamen of Nevada's claims by summarizing the allegations contained in the Complaint as follows:

> BLM's issuance of a right-of-way is contrary to FLPMA and the order classifying management of the public lands under the Classification and Multiple Use Act of 1964 because it authorizes the Department of Energy to undertake activities inconsistent with valid, existing uses and that extensively disrupt the surface and subsurface;
> To the extent the right-of-way authorizes the Department of Energy to undertake activities inconsistent with valid, existing uses, it in fact classifies anew

cause of action claims that the BLM arbitrarily and unlawfully refuses to grant Miflin and Associates, a private enterprise under contract with Nevada, a right-of-way for access to study Yucca Mountain's characteristics as a possible site for the repository. The third cause of action claims that the BLM's issuance of the RCWR to the DOE unconstitutionally infringes on Nevada's equal footing and other rights reserved to the States by the Tenth Amendment. Finally, the fourth cause of action claims that no power exercisable under the Constitution authorizes the BLM's grant of the ROWR to the DOE.

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or withdraws the public lands without observance to the procedure and substance of FLPMA; and
BLM's finding that the right-of-way authorizes activities that do not pose a significant impact on the environment is unreasonable because the environmental assessment supporting it relies upon a document of the Department of Energy that fails to satisfy the National Environmental Policy Act, 42 U.S.C. § 4321.
(Citing Complaint, #1, ¶¶ 1.12-1.14 at 6-8)

Nevada seeks (1) an order directing the BLM to rescind the ROWR granted to the DOE; (2) and order directing the BLM to grant a right-of-way permit to Miflin & Associates; (3) declaratory judgment to enjoin the BLM from permitting DOE access to Yucca Mountain that would "entail unlawful infringement upon Nevada's constitutional and political rights"; and (4) declaratory judgment as to the constitutionality of those federal statutes upon which the BLM relied in granting the ROWR to the DOE.

On June 2, 1988, the BLM filed a Motion to Dismiss (#15), for lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(1). Specifically, the BLM asserts that Nevada lacks standing to raise the first, third, and fourth causes of action, and that the second cause of action is not yet ripe for judicial review. In addition, the BLM asserts

that Nevada's third and fourth causes of action fail to state a claim upon which this Court can grant relief. Fed.R.Civ.P. 12(b)(6).

The State of Nevada filed an Opposition (#19) to the BLM's Motion to Dismiss on July 15, 1988, to which the BLM filed a Reply (#21) on August 15, 1988.

For the reasons discussed herein, this Court accepts the BLM's assertions, and therefore dismisses the State of Nevada's Complaint.

PLEADING REQUIREMENTS

For purposes of the BLM's Motion to Dismiss, the factual allegations of the Nevada's Complaint must be presumed as true, and this court must draw all reasonable inferences in favor of Nevada, the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). This court does not, however,

necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. den.* 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981). The liberal reading accorded complaints on 12(b)(6) motions is, moreover, subject to the requirement that the facts demonstrating standing must be clearly alleged in the complaint. *Id.* (We cannot construe the complaint so liberally as to extend our jurisdiction beyond its constitutional limits."), citing *Jenkins v. McKeithen*, 395 U.S. 411, 422, 89 S.Ct. 1843, 1849, 23 L.Ed.2d 404 (1969); *City of South Lake Tahoe v. California Tahoe Regional Planning Agency*, 625 F.2d 231, 237 n. 7 (9th Cir. 1980), *cert. denied*, 449 U.S. 1039, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980).

In addition, this court may take

judicial notice of facts outside the pleadings such as matters of public record, without converting BLM's Motion to Dismiss to one for summary judgment. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986).

BACKGROUND

In February 1983, pursuant to the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. § 10101 (1982), Nevada was notified that certain public lands near Yucca Mountain were under consideration as a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel.[2] The BLM administers the lands in

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[2]The NWPA entrusts the Secretary of Energy with the responsibility of identifying a site suitable for study as a potential repository for the storage of radioactive waste and spent nuclear fuel. 42 U.S.C. § 10101, *in passim*. The statute first requires the Secretary to issue guidelines for selecting possible sites in various geologic media. 42 U.S.C. § 10132(a) (1982). Second, the Secretary is to use those guidelines to nominate at least five sites that warrant intensive study, statutorily termed as

question under the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 ("FLMPA"). FLMPA directs that management of public lands shall be "on the basis of multiple use." 43 U.S.C.

"site characterization." 42 U.S.C. § 10132(b) (1982). An environmental assessment must accompany each of the nominations, which must "include a detailed statement of the basis for such recommendation and of the probable impacts of the site characterization activities planned for such site, and a discussion of alternative activities relating to site characterization that may be undertaken to avoid such impacts." 42 U.S.C. § 10132(b)(1)(E) (1982). After nominating at least five sites, the Secretary must recommend three for site characterization to the President. 42 U.S.C. § 10132(b)(1)(B) (1982). If the President approves that recommendation, the Secretary is to begin site characterization at each locale. *See generally* 42 U.S.C. § 10133 (1982).

In 1986, the Secretary announced the nomination of five sites as suitable for site characterization. *See* 51 Fed.Reg. 19783-19784 (June 2, 1986). On the same day, the Secretary announced that he had recommended three of the sites, one in Deaf Smith County, Texas, one at Yucca Mountain, Nevada, and one on the Hanford Reservation in Washington, for site characterization, and that the President had approved that recommendation. In 1987, Congress amended the NWPA to the extent that site characterization was to proceed only at one site, Yucca Mountain, Nevada. (See discussion, *infra*.)

Upon completion of site characterization, the Secretary must recommend to the President a single site for development as a repository. 42 U.S.C. § 10134(a)(1) (1982). Finally, the President shall submit that recommendation to Congress, triggering an elaborate procedure which will determine whether that site can in fact be developed as a repository. 42 U.S.C. §§ 10134-10137 (1982).

§ 1701(a)(7) (1976).[3]

On November 23, 1987, the DOE filed an application with the BLM for a right-of-way reservation ("ROWR") in order to perform site characterization studies at the Yucca Mountain site. The application also sought a ROWR over federally-owned land adjacent to the public lands, within the Nellis Air Force Range.

On December 21, 1987, Congress enacted the Nuclear Waste Policy Act Amendments of 1987, Pub.L. No. 100-203, Title V, § 5002 (1987) (codified at 42 U.S.C. § 10101 (West Supp. 1988)). Pursuant to the 1987 Amendments, the Secretary of Energy is directed to undertake site characterization at only one locale, specifically, Yucca Mountain. Pub.L. 100-203, Title V, § 5011(e)-(g)

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[3]Multiple use is described as "making the most judicious use of the land for some or all of the public lands," and, where appropriate, allowing individuals to "use some land for less than all of the resources." 43 U.S.C. § 1702(c) (1976).

(1987); 42 U.S.C. § 10133(a)-(c) (West Supp. 1988).[4]

The 1987 Amendments do not, however, alter the one provision contained in the NWPA which regulates the role of the BLM insofar as granting access to Yucca Mountain for site characterization. Namely, section 120(a)(1), which provides in pertinent part:

> To the extent that the taking of any action related to the site characterization of a site . . . under this part requires a certificate, *right-of-way*, permit, lease, or other authorization from a Federal agency or officer, such agency or officer *shall issue or grant such authorization* at the earliest practicable date, *to the extent permitted by the applicable provisions of law* administered by such agency or officer . . . .
>
> * * *
>
> Any authorization issued or granted pursuant to . . . this section shall include such terms and conditions as

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[4]The Amendments explicitly state that if the Secretary determines during the site characterization work that Yucca Mountain is unsuitable for development as a repository, he shall terminate those activities and, within six months, provide recommendations on further action to Congress. Pub.L. 100-203, Title V, § 5011(g)(3) (1987); 42 U.S.C. § 10133(c)(3)(A)-(F) (West. Supp. 1988).

> may be required by law, and may include terms and conditions permitted by law. 42 U.S.C § 10140 (1982) (emphasis added).[5]

The BLM granted the ROWR to the DOE on January 6, 1988. The decision authorizes the DOE to undertake activities related to site characterization on 51,789 acres near Yucca Mountain. The ROWR extends only to the acreage which the BLM manages under FLPMA, it does not authorize DOE to undertake activities on the Nellis Air Force Range. On February 5, 1988, the State of Nevada, represented by the Nevada Attorney General, timely filed a Notice of Appeal, thereby initiating administrative review of the BLM's decision granting the ROWR by the

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[5]The BLM's Motion to Dismiss contains a concise discussion of its authority to allow the DOE to occupy and use public lands adjacent to Yucca Mountain for purposes of conducting site characterization. (#15, at 7-11) *See also* 43 U.S.C. § 1767 ("Rights of way for Federal departments and agencies"), *cross referenced* with 43 U.S.C. § 1732 ("Management of use, occupancy, and development of public lands").

Department of Interior Board of Land Appeals.[6]

Following Nevada's filing of this action, the Interior Board of Land Appeals granted Nevada's motion to stay the administrative proceedings pending the outcome of this action on August 3, 1988.

On September 30, 1987, Miflin and Associates, a private enterprise under contract with Nevada to independently assess Yucca Mountain's characteristics as a repository, applied to the BLM for access to the Yucca Mountain site for geologic and hydrologic testing in connection with Nevada's oversight role. Nevada seeks a Writ of Mandamus to compel the BLM to grant Miflin and Associates,

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[6]The BLM incorporated DOE's environmental assessment, required under the NWPA. Nevada has claimed that the environmental assessment does not address the full range of issues required by the NWPA, and this contention is presently at issue before the Ninth Circuit Court of Appeals. *Nevada v. Herrington,* Case No. 86-7309. Accordingly, this court need not consider the adequacy of the environmental assessment.

as Nevada's contractor, a right-of-way to permit access for site characterization studies as part of Nevada's oversight and monitoring functions. In its Motion to Dismiss, the BLM states that it is currently considering Mifling and Associates' updated and corrected application.

STANDING DOCTRINE OVERVIEW

The BLM challenges the standing of Nevada to maintain this action. Standing is highly case-specific, and turns on the precise allegations of the party seeking relief. *Compare Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (denying standing to an environmental organization challenging development of a ski resort in a national forest because it failed to identify "specific injury" to members) *with United States v. SCRAP*, 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973) (finding

pleadings alleged facts which, if true, would establish standing by environmental group to challenge Interstate Commerce Commission's allowance of rail freight increase which identified members whose recreational and aesthetic interests would be allegedly injured because rate increase would lead to heightened use of raw, instead of recycled, scrap metal).

Standing involves both limitations imposed by the "case or controversy" requirement of Article III of the Constitution and "prudential limits on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The standing doctrine limits the jurisdiction of federal courts to parties who demonstrate "injury in fact." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473, 102 S.Ct 752, 759, 70 L.Ed.2d 700 (1982).

The Supreme Court has the "injury in fact" requirement as embracing three separate, yet necessarily intertwined elements: The party invoking the court's authority must demonstrate (1) "some actual or threatened injury" that (2) "fairly can be traced to the challenged action" and (3) "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. at 472, 102 S.Ct at 758 (*quoting Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979), and *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925-26, 48 L.Ed.2d 450 (1976), respectively). *See also Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

The first of these elements, that a

party "has been or will in fact be perceptibly harmed by the challenged agency action," *see United States v. SCRAP*, 412 U.S. at 688, 93 S.Ct. at 2416, is the core of standing. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 704 (D.C.Cir. 1988). The requisite injury, however, cannot be to merely "abstract" interests. *See Diamond v. Charles*, 476 U.S. 54, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986); *Simon*, 426 U.S. at 40, 96 S.Ct. at 1925; *Sierra Club*, 405 U.S. at 739-740, 92 S.Ct. at 1368-69.

The second element is causation: the injury alleged must be "fairly traceable" to the challenged action. The Supreme Court has indicated that indirectness of causation is not necessarily a barrier to standing. *See Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (environmental group

had standing to challenge limitation on utility liability in event of nuclear accident); *see also Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (whale watching group had standing to challenge failure of Secretary of Commerce to cite Japan for violations of international limitations on harvesting of whales).

The third and final element of standing analysis is redressability. Differentiating "[t]he 'fairly traceable' and 'redressability' components of the constitutional standing inquiry," the Supreme Court observed that the causality inquiry "examines the causal connection between the [defendant's--here, the BLM's] assertedly unlawful conduct and the alleged injury" while the redressability inquiry "examines the causal connection between the alleged

injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. at 752, 104 S.Ct. at 3326 n.19. In this case, the "redressability" requirement therefore demands that Nevada demonstrate that there is a "substantial likelihood" that the relief requested would preclude the BLM from issuing at some future date, the ROWR to the DOE, in accordance with NWPA and the FLPMA. *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. at 75 n.20, 98 S.Ct. at 2631 n.20.

In addition, the courts have imposed standing limitations beyond those required by the Constitution. These prudential limitations arise from a concern that the courts not "be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be

unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. at 500, 95 S.Ct. at 2206.

Hence, the courts have held that when the alleged harm is a "generalized" or "abstract" grievance shared by a large class of citizens, jurisdiction will not be exercised. *Western Mining Council v. Watt*, 643 F.2d 618, 623 (9th Cir. 1981), *citing Warth v. Seldin*, 422 U.S. at 499, 95 S.Ct. at 2205; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Ex Parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937).

NEVADA FAILS TO DEMONSTRATE ACTUAL INJURY

The case or controversy requirement of Article III, which limits the jurisdiction of the federal courts, also

applies to actions under the Declaratory Judgments Act, 28 U.S.C. § 2201. *Western Min. Council v. Watt*, 643 F.2d at 623; *Stewart v. M.M. & P. Pension Plan*, 608 F.2d 776, 782 (9th Cir. 1979). Accordingly, the requirements for standing and justiciability apply to an action, such as Nevada's, for declaratory judgment. Thus, "the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Western Min. Council v. Watt*, 643 F.2d at 624, *quoting Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

[1] To satisfy the first element of the standing requirement, Nevada must

allege some threatened or actual injury resulting from the BLM's granting of the ROWR to the DOE. Nevada's Complaint contains no averments that the State uses the public lands adjacent to Yucca Mountain for any purpose. Instead, Nevada contends that the BLM's grant of the ROWR to the DOE contravenes FLPMA. In effect, Nevada's first, third, and fourth causes of action constitute a generalized grievance that the BLM is not acting in a way in which the State maintains is in accordance with the FLPMA and the Constitution.[7]

[2] In more specific terms,

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[7]This particular allegation does not, as a matter of law, confer standing upon Nevada. In *Allen v. Wright*, 468 U.S. at 754, 104 S.Ct. at 3326, the Supreme Court maintained:

> This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court . . . . "[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning." (Citations omitted).

Nevada's Complaint includes an allegation that site characterization can disturb the surface and subsurface of the public lands in the affected area, and with other uses. (#1, ¶1.14, at 7-8). Inasmuch as the area to be affected by the site characterization is public land administered by the BLM, Nevada has not indicated any proprietary or sovereign interests in such public lands.

Beyond this, in the most generalized terms, Nevada contends in its Opposition to the BLM's Motion to Dismiss (though not in its Complaint) that grave consequences shall befall the State and its citizens if, at the culmination of the NWPA process, Yucca Mountain is indeed utilized as a repository.[8]

The Court does not discount or

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[8]Cited as "specific examples of direct injury to Nevada's sovereign and quasi-sovereign interests," Nevada discusses the polarization of the population and political infrastructure, and the potentially negative influence a repository would have on the state's image as a tourist destination. (#19 at 26-27)

minimize the concerns expressed by Nevada, but recognizes as well that the NWPA process is not complete and no final determination has yet been made as to the utilization of Yucca Mountain as a repository. Nevada's allegations of potential harm are, however, at this time insufficient to establish that the State of Nevada has or will subject to actual injury due to the BLM's action permitting the DOE to proceed with site characterization studies at Yucca Mountain.[9]

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[9]The BLM's Reply Memorandum cogently responds to Nevada's "specific examples" as follows:

> Each [example of "direct injury"] lacks any referent [sic] in the Complaint . . . . The first example also apparently presumes that Nevada's sovereign and quasi-sovereign interests encompass political unanimity among its citizens and institutions. The absence of authority for the proposition is telling. The second example depends upon the existence of a repository. But BLM's decision only authorizes DOE to occupy, use and develop the public lands to study their characteristics for a site. If and when a repository may be built is numerous decisions away, *all to be made by agencies and institutions other than the BLM*. The harm averred, thus, lacks any causality to the [BLM] decision in question.
> (#21, at 25-26, n.5) (emphasis added).

Indeed, the Supreme Court has held that "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin,* 422 U.S. at 499, 95 S.Ct. at 2205. Similarly, in the context of a state taxpayer challenge to federal statutes in *Flast v. Cohen*, 392 U.S. 83, 106, 88 S.Ct. 1942, 1956, 20 L.Ed.2d 947 (1968), the Supreme Court noted that standing requirements exist so that courts will not be asked to adjudicate "generalized grievances about the conduct of government or the allocation of power in the Federal System."

[3] Nevada further alleges that its interests have been sacrificed at the alter of political expediencey by the elected representatives of her sister

states, inasmuch that if the nuclear waste repository is eventually established at Yucca Mountain, the citizens of Nevada will be at a disproportionate risk of accident. That a particular federal law, the NWPA is this case, affects Nevada more significantly than her sister stats (some of which might not be affected at all), is insufficient to sustain standing.

Allegations of a federal statute's disproportionate impact has been considered before in this circuit in the context of standing requirements. In *Western Min. Council v. Watt*, 643 F.2d 618 (9th Cir. 1981), *supra* various plaintiffs sought a declaratory judgment rendering all or part of the FLPMA unconstitutional. The plaintiffs argued that since some states contain less public land than does California, the FLPMA injured them as California

taxpayers because it restricted California's tax base, causing an increase in the amount of taxes which plaintiffs had to pay. *Id.* at 630.

The Ninth Circuit panel affirmed the district court's dismissal for failure to state a claim upon which relief could be granted, on the grounds that the plaintiffs lacked standing:

> The increase in state taxes allegedly suffered by plaintiffs is at best a *highly generalized injury*. A great many federal statutes potentially affect the level of state taxes. Here, plaintiffs' interest in the effect of the retention and reimbursement policies [regarding the administration of public lands pursuant to FLPMA] on state taxes is shared in somewhat differing degrees by the taxpayers of all states which contain public lands. We hold that this interest is insufficient to give plaintiffs standing to challenge the constitutionality of [the FLPM]. *We do not sit to pass judgment on congressional declarations of policy which affect plaintiffs only in an attenuated and generalized way. Plaintiffs must look to the legislative branch for redress of such generalized grievances.* *Id.* at 632 (emphasis added).

In conclusion, even assuming *arguendo*, that the BLM 's action is violative of the FLPMA and/or the NWPA, Nevada has nonetheless failed to demonstrate "actual injury" that is "fairly traceable" to the challenged conduct and "likely to be redressed by the requested relief." The only direct consequence flowing from the complained BLM action is that the site characterization process will proceed to the next step in accordance with the NWPA.[10] Any potential risks which may be created by the eventual establishment of a nuclear waste repository at Yucca Mountain will be justiciable, if at all, following the completion of all

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[10]The site characterization at Yucca Mountain must proceed according to the procedural scheme established by the NWPA, which provide for the State of Nevada opportunities to monitor the process, provide input, make recommendations, receive financial assistance, and appeal. 42 U.S.C. §§ 10134-10137. In sum, numerous steps mandated by the NWPA prior to the establishment of a repository at Yucca Mountain have yet to commence.

preliminary studies conducted and all procedural steps undertaken, pursuant to the NWPA.

NEVADA'S PARTICIPATION RIGHTS UNDER THE NWPA INSUFFICIENT TO CONFER STANDING TO CHALLENGE BLM ACTION

[4] Nevada asserts that its oversight role under the NWPA confers standing to insist that the BLM perform its duties according to the applicable statutes. Nevada's Complaint does not allege a violation of the NWPA. Rather, Nevada asserts that the BLM's grant of the ROWR to the DOE violated the FLPMA, which in turn, prejudices Nevada's oversight role as provided for in the NWPA. This contention is without merit.

This Court is cognizant of *Nevada ex rel. Loux v. Herrington*, 777 F.2d 529 (9th Cir. 1985) ("Nevada I"), which held that Nevada had standing to contest DOE's

decision to deny funding for Nevada's expenditures on studies designed to evaluate whether Yucca Mountain should be used as a repository, and declared unlawful DOE's guidelines on site characterization phase grants. The decision is not, however, inconsistent with the BLM's contention that Nevada lacks standing to seek declaratory relief in this action.

In *Nevada I,* DOE denied funding for Nevada's proposed site characterization studies for fiscal year 1985, relying on internal guidelines authorized by the NWPA. The Ninth Circuit panel appropriately noted that the NWPA authorized funding for state studies as soon as the state had been notified that it hosts a potential site. *Nevada I,* 777 F.2d 529 at 533, *citing* 42 U.S.C. § 10121(b). The denial of such federal funds therefore had a "direct and

immediate" effect on Nevada's testing activities, "discouraging the state from embarking on the lengthy and detailed independent site studies that would allow it to fully evaluate DOE's conclusions." *Id.*, at 535. The court concluded that the denial of funds created a dilemma not contemplated by the NWPA:

> The state must therefore choose now between "disadvantageous compliance and rising sanctions,"--either to restrict its testing to those forms which would be funded under the Guidelines even though its evaluation of DOE's studies would thereby be impaired, or to perform such testing at its own expense. Resolution of the Guidelines now will foster, rather than impede, effective administration of the Fund by DOE since DOE's decision to fund the states' ongoing budget requests will necessarily be controlled by the challenged Guidelines. *Id.*, (citations omitted).

No such "Hobson's choice" confronts Nevada in this case. The BLM's action at issue here is simply a step in the site characterization process authorized by the NWPA. The BLM grant of the ROWR to

the DOE does not preclude Nevada from conducting any activity authorized by the NWPA. If the BLM's action precluded Nevada from participating in the site characterization process, Nevada might well have standing to argue deprivation of its statutory rights. However, the BLM's grant of the ROWR to the DOE does not have any effect that even remotely prejudices Nevada's right to conduct its own site studies. As such, the BLM's action cannot be construed as prejudicing Nevada's statutory participation rights in the repository siting process.

Indeed, in *Nevada v. Herrington*, 827 F.2d 1394 (9th Cir. 1987) ("Nevada II"), which cogently summarizes the potential host state's "cooperative and concurrence role" in the repository siting process pursuant to the NWPA, *Id.* at 1397, the Ninth Circuit denied several states' (including Nevada's) petition for review

of the DOE's decision that states could not use grant monies from the Nuclear Waste Fund to finance their participation in judicial review proceedings pursuant to the NWPA:

> The states contend that the language of section 10136 ["Participation of States"] itself mandates funding for judicial review because on its face it authorizes funding of "review" of [DOE's] activities under the [NWPA]. When we look to the context of the word "review," however, we find the more plausible construction of the word is that it is limited to a state's independent evaluation of siting activities and does *not encompass a court's review*. Section 10136(c)(1)(B) sets forth an exhaustive list of activities for which a state may use grant funds. The express language of this section provides that ["the Secretary shall make grants to the State of Nevada and any affected unit of local government for the purpose of enabling such State or affected unit of local government]--(i) to review activities taken under [this part (of the NWPA) with respect to the Yucca Mountain site."] Our interpretation of this provision as *limited to state review rather than federal court review* is consistent with the other enumerated activities specified in the section; activities involving [Nevada's] information gathering, evaluation, and dissemination to its residents. As

> we stated in *Nevada I*, the NWPA's state participation provisions authorized "independent oversight and peer review" by states. Neither the language of section 10136 nor its legislative history makes any reference to *judicial review*.
> The states also contend that funding for judicial review is mandated by section 10137(c)(11). That section provides that the consulation and cooperation agreement must specify procedures for resolving a state's objections "through negotiation, arbitration, or other appropriate mechanisms." Petitioners argue that "other appropriate mechanisms" include judicial review. This contention also fails.
>
> * * *
>
> This is not to say that the states have no access to the courts. Congress provided for judicial review in section 10139 of the [NWPA] and the states are free to challenge DOE's actions pursuant to this provision.
> *Id.* at 1399, 1400 (footnote, citation omitted) (emphasis added).[11]

Nevada's Complaint contains no allegations that the BLM acted to deny

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[11]The Nuclear Waste Policy Act Amendments of 1987, replaced, *inter alia*, the general reference "each State in which a candidate site for a repository is approved" with "the State of Nevada and any affected unit of local government. This change reflects the Congressional intent to focus on the Yucca Mountain site. This court sees nothing in the Amendments which would indicate a change in the Ninth Circuit's rationale in *Nevada II*.

Nevada any funds authorized by the NWPA. Morever, *Nevada I* and *Nevada II* clearly indicate that the "cooperative and concurrence role" in the site characterization program codified in the NWPA does not permit Nevada, as the potential host state of the repository, to stop the site characterization process. Rather, the terms of the NWPA indicate that Congress intended a parallel system of state and federal monitoring and planning, which could culminate in the establishment of a repository at Yucca Mountain.[12]

In sum, if the BLM's action precluded Nevada from participating in the site characterization process, Nevada might well have standing to argue deprivation of its statutory rights. The

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[12]While the allegations that Miflin and Associates are being unlawfully denied access to Yucca Mountain do implicate a possible violation of Nevada's statutory participation rights codified at 42 U.S.C. §§ 10131, 10136, and 10137, Nevada's second cause of action is not yet ripe. (*See* discussion below.)

BLM's grant of the ROWR to DOE does not, however, prejudice Nevada s right to conduct its own site studies. As such, the BLM cannot be construed as acting to obstruct Nevada's statutory participation rights in the repository siting process.

RIGHT-OF-WAY APPLICATION OF MIFLIN & ASSOCIATES IS NOT RIPE

[5] Nevada's second cause of action seeks an order compelling the BLM to grant a right-of-way permit to Miflin & Associates, the private firm retained by Nevada to conduct analysis of Yucca Mountain as a repository. Miflin's application for a right-of-way across the public lands adjacent to Yucca Mountain is dated September 30, 1987. Miflin subsequently acknowledged by letter dated April 25, 1988, that its application was deficient, as pointed out by the BLM in previous correspondence. The BLM is

currently considering Miflin's corrected application.

There has been no final administrative action on the part of the BLM. The correspondence through which the BLM notified Miflin of the deficiencies in its application, even if classified as interlocutory procedural rulings, is not reviewable. Premature review could lead this Court to unnecessarily entangle itself "in abstract disagreements over administrative policies" or unnecessarily interfere with agency decision-making before the "decision has been formalized and its effects felt in a concrete way by the challenging parties." *Maine v. Herrington*, 790 F.2d 8, 9 (1st Cir. 1986), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967).

Any order by this Court concerning

the processing of Miflin's application for right-of-way would interfere with, if not preempt, the BLM's decision-making process. *See State of Cal. Dept. of Educ. v. Bennett*, 833 F.2d 827, 833 (9th Cir. 1987). Therefore, the Court finds that Nevada's second cause of action is not ripe for judicial review.

NO VIOLATION OF NEVADA'S CONSTITUTIONAL RIGHTS

[6] Nevada's third and fourth causes of action assert that the BLM's grant of the ROWR to the DOE, in the face of Nevada's stated disapproval, violates the equal footing doctrine, infringes upon the State's sovereignty, and thereby infringes on Nevada's rights reserved under the Tenth Amendment. Nevada fails, however, to state a claim upon which relief can be granted.

The Property Clause provides that "Congress shall have Power to dispose of

and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. The Supreme Court has "repeatedly observed" that "'[t]he power over the public land thus entrusted to Congress i without limitations.'" *Kleppe v. New Mexico*, 426 U.S. 529, 539, 96 S.Ct. 2285 2291, 49 L.Ed.2d 34 (1976), *quoting United States v. San Francisco*, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940).

This does not mean, however, that the Property Clause exempts public lands from all state regulation. As the Court in *Kleppe* explained:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to *enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts,* the federal legislation necessarily overrides conflicting state laws

under the Supremacy Clause. 426 U.S. at 543, 96 S.Ct. at 2293 (citations omitted) (emphasis added).

Inasmuch as the BLM is authorized, indeed required, pursuant to the NWPA, to facilitate the site characterization of Yucca Mountain, it is likewise authorized, in accordance with the FLPMA, to grant a permit to the DOE, a sister federal agency with access for such Congressionally mandated purposes. Consequently, Nevada's approval is not, as a matter of law, necessary.[13]

As a final matter, Nevada asserts that the NWPA Amendments of 1987, which designate Yucca Mountain as the only site to be studied by the DOE, arose out of a

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[13]Nevada's claim that the BLM's decision "seriously diminish[es]" its "equal footing and Tenth Amendment rights" is likewise without merit. (Complaint, #1 ¶ 3.2 at 10-11). The BLM's Motion to Dismiss discusses this adequately (#15 at 59-66), and this Court only emphasizes Nevada's Statehood Act of 1864, in which the then territory of Nevada declared to "forever disclaim all right and title to the unappropriated public lands lying within said territory." 13 Stat. 30 (1864).

political conspiracy between the BLM, th DOE and Congress designed to isolate Nevada and render it the unwilling host of the repository. Consequently, Nevada argues, the BLM's grant of a ROWR to DOE is the fruit of the conspiracy, thereby enabling Nevada to assert a claim for relief based on deprivation of the equal footing doctrine and the Tenth Amendment

Nevertheless, it is well establishe that the Tenth Amendment limits on Congress' authority to regulate state activities are "structural, not substantive--i.e., that States must find their protection from congressional regulation through the national politica process, not through judicially defined spheres of unregulable state activity." *South Carolina v. Baker*, ___ U.S. ___, 108 S.Ct. 1355, 1360, 99 L.Ed.2d 592 (1988), *citing Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S.

528, 537-554, 105 S.Ct. 1005, 1010-1019, 83 L.Ed.2d 1016 (1985).

In *South Carolina v. Baker*, the state contended that the political process failed because Congress enacted a provision to the Internal Revenue Code which adversely affected state and local government bonds. In rejecting this argument, the Supreme Court stated:

> Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation. Nor do we attempt any definitive articulation here. It suffices to observe that South Carolina has not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless . . . . *[N]othing in Garcia or the Tenth Amendment authorizes courts to second-guess the substantive basis for congressional legislation.* Where, as here, the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated. 108

S.Ct. 1355 at 1360-61 (emphasis added).

[7] In this case, Nevada asserts that it was singled out by a political conspiracy "render[ing] Nevada, a politically weak state, defenseless to the interests of the other 49 states . . . ." (#1, ¶3.2, at 10). Nevada offers as proof of this alleged conspiracy the fact that no member of its congressional delegation was present at certain committee meetings at which the NWPA Amendments of 1987 were promulgated. There is no indication, however, that Nevada lawmakers were inappropriately *denied* the opportunity to contribute input or otherwise participate. Consequently, this court cannot conclude that the promulgation of national legislation affecting one state in a particular manner is sufficient to establish an "extraordinary defect in the national political process," sufficient

to implicate a violation of the Constitution.[14]

CONCLUSION

This court must concur with the BLM's summation of its Motion to Dismiss, which boils down Nevada's Complaint to its essence:

> [n]judicial opinion exists holding that the Congress' power to decide when, where, how and whom may use the public lands is so coterminous with a state's sovereignty that the federal government's needful regulation must, as a matter of constitutional law, depend upon a state's consent. Consequently, Nevada may not abrogate its binding agreement [Statehood Act] forever disclaiming any right to interfere with Congress' needful regulation of the public lands. Neither under the equal footing doctrine with the other states, nor otherwise, does Nevada have any right reserved to it that requires the BLM to obtain the state's consent before allowing the

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[14]Moreover, Nevada's challenge under the Tenth Amendment is directed solely at the NWPA Amendments of 1987, which designate Yucca Mountain as the sole study site. Consequently, this court is without jurisdiction, since Congress vested original and exclusive jurisdiction over such matters arising under the NWPA with the courts of appeal. 42 U.S.C. § 10139(a)(1)(C) (1982); *General Elec. Uranium v. U.S. Dept. of Energy*, 764 F.2d 896, 901-02 (D.C. Cir. 1985).

Department of Energy to occupy and use public lands for a purposes Congress itself mandates. BLM's Motion to Dismiss (#15 at 66).

IT IS THEREFORE ORDERED THAT the State of Nevada's Complaint (#1) is DISMISSED.

BLM ORDER OF JANUARY 6, 1988

Certified Mail

Return Receipt Requested

D E C I S I O N

State of Nevada :

Office of the : Right-of-Way

Attorney General :

Capitol Complex :

Carson City, NV 89710:

OBJECTIONS DISMISSED

RIGHT-OF-WAY GRANTED

By right-of-way reservation pursuant to Section 507 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2781, 43 U.S.C. 1767), the Bureau of Land Management (BLM) has authorized to the

Department of Energy (DOE) the use of public lands in Bullfrog county for site characterization studies. The reservation to DOE was granted on this date. A copy of the reservation document is enclosed.

The State of Nevada is hereby notified of this action because it has objected to the issuance of a right-of-way in lieu of a withdrawal of the lands for the project. The objection is dismissed and the right-of-way has been granted.

The issuance of this right-of-way grant constitutes a final decision by the BLM in this matter. You have the right of appeal to the Board of Land Appeals, Office of the Secretary in accordance with the regulations in 43 CFR Part 4.400. If an appeal is taken the notice of appeal must be filed in the Nevada State Office of BLM (not the Office of the Board) within thirty (30) days of

receipt of the decision appealed from, so that the case file can be transmitted to the Board. The notice may contain a statement of reasons for the appeal but if not, such a statement must be filed with the Board (Address: Board of Land Appeals, Office of the Secretary, Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203) within thirty (30) days after the notice was filed. Additionally, the appellant must serve a copy of the notice of appeal and of any reasons, written arguments, or briefs on the Regional Solicitor, Pacific Southwest Region (Address: U.S. Dept. of the Interior, 2800 Cottage Way, Room E-2753, Sacramento, CA 95825) and each adverse party named in the decision appealed from, in the manner prescribed in Sec. 4.401(c), not later than fifteen (15) days after filing the document. To avoid summary dismissal of the appeal,

there must be strict compliance with the regulations. The appellant has the burden of proof by positive and substantial evidence wherein the decision appealed from is in error.

Edward F. Spang
State Director, Nevada

2 Enclosures
1. Copy of Reservation
2. Appeal Information Form 1842-1

cc: State of Nevada,
Nuclear Waste Project
(w/enclosure) Certified Mail

bcc: Director (321), Room 3643,
MIB (w/enclosure)
DM, Las Vegas (w/enclosure)
DOE, Waste Management
Project Office,
Nevada Operations Office

JMOFFITT;DMR;12/22/87

COMPLAINT

BRIAN McKAY, ATTORNEY GENERAL
STATE OF NEVADA
Harry W. Swainston, Deputy Attorney General
Capitol Complex
1802 N. Carson St., Suite 252
Carson City, NV 89710
(702) 885-5866

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

* * *

THE STATE OF NEVADA Plaintiff, v. ROBERT F. BURFORD, Director, Bureau of Land Management, Department of Interior, EDWARD F. SPANG, Nevada State Director, Bureau of Land Management, Department of Interior, Defendants.	Civ. No._____ COMPLAINT FOR MANDAMUS, INJUNCTIVE AND DECLARATORY RELIEF AND FOR JUDICIAL REVIEW

Plaintiff alleges:

FIRST CAUSE OF ACTION

1.1 The jurisdiction of this Court arises under 28 U.S.C. § 1331, 28 U.S.C. § 1361, 28 U.S.C. §§ 2201-2202, and 5 U.S.C. §§ 702-706, as hereinafter more fully appears.

28 U.S.C. § 1331 provides that the District Courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1361 provides that the District Courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States to perform a duty owed to the Plaintiff.

28 U.S.C. § 2201 provides that in a case of actual controversy within its jurisdiction any Court of the United States, upon the filing of an appropriate

pleading, may declare the rights and other legal relations of any interested party seeking such declaration.

5 U.S.C. § 702 provides that a person suffering legal wrong because of agency action is entitled to judicial review thereof and an action seeking specific relief may not be dismissed nor relief be denied on the ground that it is against the United States or that the United States is an indispensable party. 5 U.S.C. § 706 provides that the reviewing court shall interpret and decide the relevant question of law and compel agency action unlawfully withheld or unreasonably delayed and hold unlawful and set aside agency action under certain listed circumstances of unlawfulness.

1.2 This action arises under federal common law; the equal-footing doctrine; Article I, § 8, cl. 17 of the Constitution; Article IV, § 3 of the

Constitution; the Fifth and Tenth Amendments to the Constitution, the Federal Land Policy And Management Act of 1976 (FLPMA), 43 U.S.C. § 1701, et seq.; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321, et seq.; the Classification and Multiple Use Act of 1964, 43 U.S.C. § 1411-15 (now expired); the Mining Law of 1872, as amended 30 U.S.C. § 21, et seq.; the Minerals Leasing Act of 1920, 30 U.S.C. §§ 49, 50, 181 et seq.; the Mining and Mineral Policy Act of 1970, 30 U.S.C. § 21a; the Geothermal Steam Act, 30 U.S.C. §§ 1001-1025; the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10101, et seq., as amended by the Nuclear Waste Policy Act Amendments Act of 1987, Title V, Pub. L. 100-203; and the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, et seq.

1.3 Plaintiff State of Nevada brings

this action in its sovereign capacity, its proprietary capacity and as parens patriae of its citizens.

1.4 Plaintiff State of Nevada is a sovereign State of the United States. On February 2, 1983, the Governor and Legislature of the State of Nevada were notified pursuant to Section 116(a) of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. § 10136, that a repository for the disposal and storage of high-level radioactive waste and spent nuclear fuel may be located in a tuff medium at Yucca Mountain in southeastern Nevada. On December 21, 1987 the Congress enacted the Omnibus Budget Reconciliation Act of 1987, Pub. L. 100-203. Title V of the Act contains the Nuclear Waste Policy Amendments Act of 1987 (NWPAA). In the 1987 amendments Congress selected the Yucca Mountain site as the only site to be characterized for

possible development as a repository site. Congress, however, did not withdraw, segregate or set aside the Yucca Mountain site from the public lands. General provisions of law were, therefore, to remain applicable for this purpose.

1.5 The Plaintiff State of Nevada, has oversight and monitoring responsibility for the Department of Energy's program to characterize the site and, if subsequently selected, for the construction of a high-level nuclear waste repository at Yucca Mountain, Nevada. The State's oversight role extends to agency action by the BLM insofar as it affects site characterization.

1.6 Defendant Robert F. Burford is the duly appointed, qualified and acting Director of the Bureau of Land Management, Department of Interior.

Defendant Edward F. Spang is the Nevada State Director of the Bureau of Land Management, Department of Interior. Section 120 of the NWPA, 42 U.S.C. § 10140, requires Defendants Burford and Spang to expedite the issuance of appropriate authorizations for land use in connection with the characterization of Yucca Mountain "to the extent permitted by the applicable provisions of law administered by such agency or officer."

1.7 Officials of the Department of Energy, on or about November 23, 1987, filed an Application For Transportation And Utility Systems And Facilities On Federal Lands (Form 299) with the Nevada Bureau of Land Management Office seeking a right-of-way reservation to perform site characterization studies at the Yucca Mountain site.

1.8 On January 6, 1988, Defendant Edward

F. Spang granted the Department of Energy's application for a right-of-way reservation (ROWR) pursuant to presumed authority in Section 507 of FLPMA despite the Nevada Attorney General's vigorous opposition to an approval of a ROWR and his contention that a withdrawal established pursuant to the substantive and procedural provisions of FLPMA is the only appropriate land use instrument to establish an appropriate land status in advance of site characterization. The Attorney General further contended in written memoranda that the withdrawal must be established with Congressional approval and the Nevada Legislature's consent as required by Article I, § 8, cl. 17. He argued that a withdrawal with these legislative approvals was the only instrument under the circumstances and the law by which Defendants could authorize land use for the proposed site

characterization activities.

1.9 On February 5, 1988, the State of Nevada and its Nuclear Waste Project Office, represented by the Nevada Attorney General, timely filed a Notice of Appeal of Defendant Spang's decision with Spang's office, thereby initiating an appeal before the Department of Interior Board of Land Appeals. The State of Nevada has determined that resort to the Board of Appeals process would be futile because the 18-month to 24-month backlog of cases before the administrative tribunal would render a favorable decision too late to be an effective remedy. Furthermore, the legal question of whether a right-of-way reservation is an appropriate authorizing instrument has been decided by the Bureau adverse to the State's position and it is unlikely that a change in the agency's interpretation of law will be provided by

the Board of Land Appeals. The legal question, in the final analysis, is for the federal courts to make.

1.10 A case or controversy now exists between the State of Nevada and the Defendant officials of the BLM involving their issuance of the ROWR to the Department of Energy.

1.11 A case with overlapping issues is pending in the Ninth Circuit Court of Appeals against the Secretary of Energy styled State of Nevada, et al. v. John Herrington, Secretary of the United States Department of Energy, Case No. 86-7308, alleging his failure to seek a withdrawal and, contemporaneously, the Nevada Legislature's consent as required by the NWPA, the Nuclear Regulatory Commission regulations in 10 C.F.R. § 60.121 and Article I, § 8, cl. 17.

1.12 The primary litigable issue in the present complaint which does not overlap

the issues in Nevada, et al. v. Herrington, supra, involves the validity of an ROWR as the authorizing instrument for DOE site characterization activities. The State contends that the Defendants' approval of the ROWR is not authorized by FLPMA or any other lawful authority including any of the lawfully established administrative regulations which concern the granting of ROWR's in 43 C.F.R. § 2800. Furthermore, the Defendants' approval of the ROWR constitutes either an unlawful defacto reclassification of public land in violation of FLPMA or an unlawful defacto withdrawal of public land, also in violation of FLPMA. Defendant Burford is presently enjoined from altering land use classifications inconsistent with classifications existing on January 1, 1981 without compliance with the procedural and substantive requirements of FLPMA. See

National Wildlife Federation v. Robert R. Burford, U.S.D.C. District of Columbia, Civil Action No. 85-2238, affirmed, 835 F.2d 305 (DC Cir. 1987). Defendant Burford is also prohibited from maintaining defacto withdrawals. See e.g., Mountain State Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

1.13 The 51,789 acres included within the BLM managed public land portion of the ROWR are presently classified pursuant to the Classification and Multiple Use Act of 1964, 43 U.S.C. §§ 1411-18, and the regulations in 43 C.F.R. 2410 and 2411, for multiple-use management. See Notice of Classification of Public Lands, Serial Number N-1574 dated February 27, 1970 attached hereto as Exhibit "A." Numerous mining claims have been filed consistent with this classification, some of which are on the top of Yucca Mountain on sites which the Secretary of Energy proposes to

use for site characterization purposes. Other mining claims may also be anticipated. As the lands are within a known geothermal resource area, geothermal exploration and leasing activity may be anticipated. Site characterization activities as planned by the DOE are inconsistent with the current classifications.

1.14 An ROWR is a legally defective instrument for authorizing site characterization. Site characterization is an extensive investigative process involving mining operations and surface and subsurface exploration involving geological, hydrological, geophysical, geochemical, paleoclimatic, and meteorological studies which physically put people and equipment a thousand to two thousand feet below the surface of the geologic formation to evaluate the site to determine its potential

capability for meeting the requirements for a repository. Two exploratory shafts, 12 feet in diameter, whose walls will be encased with concrete two feet thick, 1100 and 1480 feet deep, are part of site characterization. These shafts, connecting drifts and the breakout rooms will become a part of the repository if it is eventually authorized and constructed. Site characterization will extend over a period of several years and will cost in excess of one billion dollars. Section 507 of FLPMA did not authorize a right-of-way permit for the extensive disruption to the surface and subsurface and interference with multiple use necessarily included in the site characterization process.

1.15 The ROWR authorization to the Department of Energy is defective for the additional reason that it does not legally describe all of the lands which

the Department of Energy will need for characterization purposes. Sections 10, 11, 14, 15, 22, 23, 26, 27 and 36 of Township 12S, Range 49E, Mount Diablo Meridian, unsurveyed, were omitted.

1.16 The adoption by Defendants of the Department of Energy's Environmental Assessment (DOE/RW 0073) which was required by the NWPA in connection with the Secretary of Energy's recommendation of the Yucca Mountain site to the President on May 28, 1986 for site characterization is unlawful as it does not satisfy the BLM's NEPA responsibility. The DOE's environmental assessment addresses only items i-vi of Section 112(b)(1)(D) of NWPA, 42 U.S.C. § 10132, and need not and does not otherwise comply with NEPA. The nomination environmental assessment is presently being contested in Nevada, et al. v. Herrington, Case No. 86-7309,

before the Ninth Circuit Court of Appeals. The State contends in that action that the environmental assessment is null and void.

1.17 Section 112(b)(1)(D), 42 U.S.C. § 10132, of the NWPA requires that an environmental assessment evaluate whether the Yucca Mountain site is suitable for development as a repository under each guideline in 10 C.F.R. Part 960 that does not require site characterization as a prerequisite for application of such guideline. The State contends that the guideline in 10 C.F.R. 960.5-2-2 relating to site ownership and control requires a determination in advance of characterization that the DOE can obtain "in accordance with the requirements of 10 C.F.R. 60.121, ownership, surface and subsurface rights, and control of access that are required . . .." The determination that leaves the actual

withdrawal and acquisition of State Legislative consent to a point in time after site characterization arbitrarily jeopardizes the expenditure of billions of dollars of the ratepayers' contributions to the Nuclear Waste Fund created by Section 302(c) of the NWPA. A further pre-site characterization requirement of 10 C.F.R. 60.121 relates to the acquisition of water rights for site characterization. Without a land withdrawal there is no assurance that the water necessary for site characterization may be obtained.

1.18 Plaintiff is entitled to an order in the nature of a Writ of Mandamus to compel Defendant officials to rescind the January 6, 1988 ROWR awarded to the Department of Energy for site characterization purposes.

SECOND CAUSE OF ACTION

2.1 Plaintiff incorporates herein by

reference the allegations of Paragraphs 1.1 through 1.18 of its First Cause of Action.

2.2 While an ROWR is decidedly an improper authorization for the Department of Energy's activities, it is appropriate under FLMPA to authorize the limited activities of a private enterprise. Defendant Spang has arbitrarily and unlawfully refused to grant the State of Nevada's contractor, Mifflin and Associates, access to the Yucca Mountain site for purposes of geologic and hydrologic testing in connection with the State's oversight role. Copies of the application filed by Mifflin and Associates with the BLM is attached hereto as Exhibit "B."

2.3 Plaintiff is entitled to an order in the nature of a Writ of Mandamus to compel Defendant officials to grant the State of Nevada's contractor, Mifflin and

Associates, a right-of-way permit to permit access for site characterization studies as a part of the State's oversight and monitoring function.

THIRD CAUSE OF ACTION

3.1 Plaintiff incorporates herein by reference the allegations of Paragraphs 1.1. through 1.18 of its First Cause of Action and Paragraphs 2.2 and 2.3 of its Second Cause of Action.

3.2 The acts of Defendants raise constitutional issues of the highest order involving the land-holding function of the United States. The Defendants have conspired with the Department of Energy Officials to create a fait accompli in which the State of Nevada's political right to object to its selection as the host for a repository for the nation's spent nuclear fuel rods is rendered meaningless. The object of their conspiracy is to render Nevada, a

politically weak State, defenseless to the interests of the other 49 states in solving a purely commercial problem at the expense of Nevada which has played no part in creating the problem. Unless the Defendants are permanently restrained and enjoined, Nevada's equal footing and Tenth Amendment rights will be seriously diminished to the detriment of Nevada and the Union of States.

FOURTH CAUSE OF ACTION

4.1 Plaintiff incorporates herein by reference the allegations of Paragraphs 1.1 through 1.18 of the First Cause of Action, Paragraphs 2.2 and 2.3 of the Second Cause of Action, and Paragraph 3.2 of the Third Cause of Action.

4.2 Plaintiff desires a judicial determination of her rights and duties and those of Defendants and a declaration as to whether Defendant officials may authorize, maintain and administer an

ROWR in favor of the Department of Energy for site characterization of Yucca Mountain.

4.3 Plaintiff State of Nevada is entitled to a decree which declares that the action of the Defendants is null and void for the reasons that the nature and degree of infringement upon an unconsenting state's sovereignty and equal footing under the circumstances of this case and particularly upon Nevada's sovereignty and equal footing is not authorized by any power exercisable under the Constitution.

PRAYER FOR RELIEF

WHEREFORE, with respect to Plaintiff's First Cause of Action, Plaintiff prays for relief as follows:

1. For an order requiring Defendant officials to rescind the January 6, 1988 ROWR granted to the Department of Energy.

With respect to Plaintiff's Second Cause of Action, Plaintiff prays for relief as follows:

2. For an order directing Defendant officials to grant Mifflin and Associates ROW permit.

With respect to Plaintiff's Third Cause of Action, Plaintiff prays for relief as follows:

3. For an order enjoining Defendant officials from conspiring with Department of Energy officials to permit access and public land usage which entail an unlawful infringement upon Nevada's constitutional and political rights to participate on an equal footing with member states of the Union.

With respect to Plaintiff's Fourth Cause of Action, Plaintiff prays for relief as follows:

4. For a declaration of the rights and duties of the parties with respect to

federal land-holding and land usage relative to the authorization of public land usage for site characterization activities by the Department of Energy based upon the facts and circumstances of this case, for a declaration of the constitutionality of the FLPMA, NWPA, and NWPAA to the extent these statutes are relied upon for the land use authorization and for a declaration that the January 6, 1988 ROWR is null and void.

With respect to all causes of action, Plaintiff prays for relief as follows:

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4.[5] For costs of suit herein; and

5.[6] For such other and further relief as to the Court appears equitable and proper.

Respectfully submitted this 24th day of March, 1988.

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CONSTITUTIONAL PROVISIONS

PROPERTY CLAUSE, Art. IV, § 3, cl. 2.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

FEDERAL ENCLAVE CLAUSE, Art. I, § 8, cl. 17.

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;

NATIONAL ENVIRONMENTAL POLICY ACT

Section 102(2)(C), 42 U.S.C. §4332(2)(C)

Cooperation of agencies; reports availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisonmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate

consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and

irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

NUCLEAR WASTE POLICY ACT[15]

FINDINGS AND PURPOSE

SEC. 111, 42 USC 10131. FINDINGS. (a)The Congress finds that--

(1) radioactive waste creates potential risks and requires safe and environmentally acceptable methods of disposal;

(2) a national problem has been created by the accumulation of (A) spent nuclear fuel from nuclear reactors; and (B) radioactive waste from (i) reprocessing of spent nuclear fuel; (ii) activities related to medical research, diagnosis, and treatment; and (iii) other sources;

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[15]The Nuclear Waste Policy Act, as Amended, is voluminous. Sections of the Act which are necessary for an understanding of the Petition For Writ Of Certiorari are reproduced in this Appendix. Some sections presented were either amended in 1987 or added to the Nuclear Waste Policy Act at that time. The amended language and new provisions are indicated by underlineation. Language of the 1982 Act which was deleted is represented by interlineations. As presented, the 1982 version of the United States Code is set forth if the amendments are disregarded. The 1982 version as amended by Supplement V, 1987 is set forth by the amendments.

(3) Federal efforts during the past 30 years to devise a permanent solution to the problems of civilian radioactive waste disposal have not been adequate;

(4) while the Federal Government has the responsibility to provide for the permanent disposal of high-level radioactive waste and such spent nuclear fuel as may be disposed of in order to protect the public health and safety and the environment, the costs of such disposal should be the responsibility of the generators and owners of such waste and spent fuel;

(5) the generators and owners of high-level radioactive waste and spent nuclear fuel have the primary responsibility to provide for, and the responsibility to pay the costs of, the interim storage of such waste and spent fuel until such waste and spent fuel is accepted by the Secretary of Energy in accordance with

the provisions of this Act;

(6) State and public participation in the planning and development of repositories is essential in order to promote public confidence in the safety of disposal of such waste and spent fuel; and

(7) high-level radioactive waste and spent nuclear fuel have become major subjects of public concern, and appropriate precautions must be taken to ensure that such waste and spent fuel do not adversely affect the public health and safety and the environment for this or future generations.

(b) PURPOSES. The purposes of this subtitle are--

(1) to establish a schedule for the siting, construction, and operation of repositories that will provide a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by high-

level radioactive waste and such spent nuclear fuel as may be disposed of in a repository;

(2) to establish the Federal responsibility, and a definite Federal policy, for the disposal of such waste and spent fuel;

(3) to define the relationship between the Federal Government and the State governments with respect to the disposal of such waste and spent fuel; and

(4) to establish a Nuclear Waste Fund, composed of payments made by the generators and owners of such waste and spent fuel, that will ensure that the costs of carrying out activities relating to the disposal of such waste and spent fuel will be borne by the persons responsible for generating such waste and spent fuel.

SITE CHARACTERIZATION

SEC. 113, 42 USC 10133. (a)IN GENERAL.

The Secretary shall carry out, in accordance with the provisions of this section, appropriate site characterization activities at the Yucca Mountain site. ~~beginning with the candidate sites that have been approved under section 10132 and are located in various geologic media.~~ The Secretary shall consider fully the comments received under subsection (b)(2) and section 10132(b)(2) and shall, to the maximum extent practicable and in consultation with the Governor of the State of Nevada ~~State involved or the governing body of the affected Indian tribe involved,~~ conduct site characterization activities in a manner that minimizes any significant adverse environmental impacts identified in such comments or in the environmental assessment submitted under subsection (b)(1) of this section.

(b) COMMISSION AND STATES. (1) Before proceeding to sink shafts at the Yucca Mountain site ~~any candidate site~~, the Secretary shall submit for such candidate site to the Commission and to the Governor or legislature of the State of Nevada ~~either the Governor and legislature of the State in which such candidate site is located, or the governing body of the affected Indian tribe on whose reservation such candidate site is located, as the case may be~~, for their review and comment-(A) a general plan for site characterization activities to be conducted at such candidate site, which plan shall include--

(i) a description of such candidate site;

(ii) a description of such site characterization activities, including the following: the extent of planned excavations, plans for

any onsite testing with radioactive or nonradioactive material, plans for any investigation activities that may affect the capability of such candidate site to isolate high-level radioactive waste and spent nuclear fuel, and plans to control any adverse, safety-related impacts from such site characterization activities;

(iii) plans for the decontamination and decommissioning of such candidate site, and for the mitigation of any significant adverse environmental impacts caused by site characterization activities if it is determined unsuitable for application for a construction authorization for a repository;

(iv) criteria to be used to determine the suitability of such candidate site for the location of a

repository, developed pursuant to section 10132(a) of this title; and

(v) any other information required by the Commission;

(B) a description of the possible form or packaging for the high-level radioactive waste and spent nuclear fuel to be emplaced in such repository, a description, to the extent practicable, of the relationship between such waste form or packaging and the geologic medium of such site, and a description of the activities being conducted by the Secretary with respect to such possible waste form or packaging or such relationship; and

(C) a conceptual repository design that takes into account likely site-specific requirements.

(2) Before proceeding to sink shafts at the Yucca Mountain site ~~at any candidate site,~~ the Secretary shall (A) make

available to the public the site characterization plan described in paragraph (1); and (B) hold public hearings in the vicinity of such candidate site to inform the residents of the area in which such candidate site is located of such plan, and to receive their comments.

(3) During the conduct of site characterization activities at the Yucca Mountain site ~~a candidate site~~, the Secretary shall report not less than once every 6 months to the Commission and to ~~either~~ the Governor and legislature of the State of Nevada ~~the State in which such candidate site located, or the governing body of the affected Indian tribe where such candidate site is located, as the case may be,~~ on the nature and extent of such activities and the information developed from such activities.

(c) RESTRICTIONS. (1) The Secretary may conduct at ~~any candidate site~~ the Yucca Mountain site only such site characterization activities as the Secretary considers necessary to provide the data required for evaluation of the suitability of such ~~candidate~~ site for an application to be submitted to the Commission for a construction authorization for a repository at such ~~candidate~~ site, and for compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) In conducting site characterization activities--

(A) the Secretary may not use any radioactive material at a candidate site unless the Commission concurs that such use is necessary to provide data for the preparation of the required environmental reports and an application for a construction authorization for a

repository at such ~~candidate~~ site; and

(B) if any radioactive material is used at a ~~candidate~~ site--

(i) the Secretary shall use the minimum quantity necessary to determine the suitability of such ~~candidate~~ site for a repository, but in no event more than the curie equivalent of 10 metric tons of spent nuclear fuel; and

(ii) such radioactive material shall be fully retrievable.

~~(3) If site characterization activities are terminated at a candidate site for any reason, the Secretary shall (A) notify the Congress, the Governors and legislatures of all States in which candidate sites are located, and the governing bodies of all affected Indian tribes where candidate sites are located, of such termination and the reasons for such termination; and (B) remove any~~

~~high-level radioactive waste, spent nuclear fuel, or other radioactive materials at or in such candidate site as promptly as practicable.~~

~~(4) If a site is determined to be unsuitable for application for a construction authorization for a repository, the Secretary shall take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities.~~

(3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall--

(A) terminate all site characterization activities at such site;

(B) notify the Congress, the Governor and legislature of Nevada of such termination and the reasons for such termination;

(C) remove any high-level radioactive

waste, spent nuclear fuel, or other radioactive materials at or in such site as promptly as practicable;

(D) take reasonable and necessary steps to reclaim the site and to mitigate any significant adverse environmental impacts caused by site characterization activities at such site;

(E) suspend all future benefits payments under subtitle F with respect to such site; and

(F) report to Congress not later than 6 months after such determination the Secretary's recommendations for further action to assure the safe, permanent disposal of spent nuclear fuel and high-level radioactive waste, including the need for new legislative authority.

(d) PRELIMINARY ACTIVITIES. Each activity of the Secretary under this section that is in compliance with the provisions of subsection (c) shall be

considered a preliminary decisionmaking activity. No such activity shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

SITE APPROVAL AND CONSTRUCTION AUTHORIZATION

SEC. 114, 42 USC 10134. (a)HEARINGS AND PRESIDENTIAL RECOMMENDATION. (1) The Secretary shall hold public hearings in the vicinity of the Yucca Mountain site ~~each site under consideration for recommendation to the President under this paragraph as a site for the development of a repository~~, for the purposes of informing the residents of the area ~~in which such site is located~~ of such consideration and receiving their

comments regarding the possible recommendation of such site. If, of upon completion of such hearings and completion of site characterization activities at the Yucca Mountain site ~~not less than 3 candidate sites for the first proposed repository, or from all of the characterized sites for the development of subsequent repositories~~, under section 10133 of this title, the Secretary decides to recommend approval of such site to the President, the Secretary shall notify the Governor and legislature of the State of Nevada ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be~~, of such decision. No sooner than the expiration of the 30-day period following such notification, the Secretary shall submit to the President a recommendation that the President approve such site for the

development of a repository. Any such recommendation by the Secretary shall be based on the record of information developed by the Secretary under section 10133 of this title and this section, including the information described in subparagraph (A) through subparagraph (G). ~~In making site recommendations and approvals subsequent to the first site recommendation, the Secretary and the President, respectively, shall also consider the need for regional distribution of repositories and the need to minimize, to the extent practicable, the impacts and cost of transporting spent fuel and solidified high-level radioactive waste~~. Together with any recommendation of a site under this paragraph, the Secretary shall make available to the public, and submit to the President, a comprehensive statement of the basis of such recommendation,

including the following:

(A) a description of the proposed repository, including preliminary engineering specifications for the facility;

(B) a description of the waste form or packaging proposed for use at such repository, and an explanation of the relationship between such waste form or packaging and the geologic medium of such site;

(C) a discussion of data, obtained in site characterization activities, relating to the safety of such site;

(D) a final environmental impact statement prepared pursuant to subsection (f) and the National Environment Policy Act of 1969 (42 U.S.C. 4321 et seq.), <u>together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the</u>

Administrator, and the Commission, except that the Secretary shall not be required in any such environmental impact statement to consider the need for a repository, the alternatives to geological disposal, or alternative sites to the Yucca Mountain site; ~~and including an analysis of the consideration given by the Secretary to not less than 3 candidate sites for the first proposed repository or to all of the characterized sites for the development of subsequent repositories, with respect to which site characterization is completed under section 10133 of this title, together with comments made concerning such environmental impact statement by the Secretary of the Interior, the Council on Environmental Quality, the Administrator, and the Commission, except that any such environmental impact statement concerning the first repository to be developed~~

~~under this Act shall not be required to consider the need for a repository or the alternatives to geologic disposal;~~

(E) preliminary comments of the Commission concerning the extent to which the at-depth site characterization analysis and the waste form proposal for such site seem to be sufficient for inclusion in any application to be submitted by the Secretary for licensing of such site as a repository;

(F) the views and comments of the Governor and legislature of any State, or the governing body of any affected Indian tribe, as determined by the Secretary, together with the response of the Secretary to such views;

(G) such other information as the Secretary considers appropriate; and

(H) any impact report submitted under section 10136(c)(2)(B) of this title by the State of Nevada. ~~the State in which~~

~~such site is located, or under section 10138(b)(3)(B) of this title by the affected Indian tribe where such site is located, as the case may be.~~

(2)(A) If, after recommendation by the Secretary, the President considers the Yucca Mountain site qualified for application for a construction authorization for a repository, the President shall submit a recommendation of such site to Congress.

~~(2)(A) Not later than March 31, 1987, the President shall submit to the Congress a recommendation of one site form the three sites initially characterized that the President considers qualified for application for a construction authorization for a repository. Not later than March 31, 1990, the President shall submit to the Congress a recommendation of a second site from any sites already characterized that the~~

~~President considers qualified for a construction authorization for a second repository. The President shall submit with such recommendation a copy of the report for such site prepared by the Secretary under paragraph (1). After submission of the second such recommendation, the President may submit to the Congress recommendations for other sites, in accordance with the provisions of this part.~~

(B) The President shall submit with such recommendation a copy of the statement for such site prepared by the Secretary under paragraph (1).

~~(B) The President may extend the deadlines described in subparagraph (A) by not more than 12 months if, before March 31, 1986, for the first site, and March 31, 1989, for the second site, (i) the President determines that such extension is necessary; and (ii)~~

~~transmits to the Congress a report setting forth the reasons for such extension.~~

~~(3) If approval of any such site recommendation does not take effect as a result of a disapproval by the Governor or legislature of a State under section 10136 of this title or the governing body of an affected Indian tribe under section 10138 of this title, the President shall submit to the Congress, not later than 1 year after the disapproval of such recommendation, a recommendation of another site for the first or subsequent repository.~~

(3)(A) ~~(4)(A)~~ The President may not recommend the approval of the Yucca Mountain site ~~any site under this subsection~~ unless the Secretary has recommended to the President under paragraph (1) approval of such site and has submitted to the President a

statement ~~report~~ for such site as required under such paragraph.

(B) No recommendation of a site by the President under this subsection shall require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C), or to require any environmental review under subparagraph (E) or (F) of section 102(2) of such Act.

(b) SUBMISSION OF APPLICATION. If the President recommends to the Congress the Yucca Mountain site ~~a site for a repository~~ under subsection (a) of this section and the site designation is permitted to take effect under section 10135 of this title, the Secretary shall submit to the Commission an application for a construction authorization for a repository at such site not later than 90 days after the date on which the

recommendation of the site designation is effective under such section and shall provide to the Governor and legislature of the State of Nevada ~~in which such site is located, or the governing body of the affected Indian tribe where such site is located, as the case may be,~~ a copy of such application.

(c) STATUS REPORT ON APPLICATION. Not later than 1 year after the date on which an application for a construction authorization is submitted under subsection (b), and annually thereafter until the date on which such authorization is granted, the Commission shall submit a report to the Congress describing the proceedings undertaken through the date of such report with regard to such application, including a description of--

(1) any major unresolved safety issues, and the explanation of the Secretary with

respect to design and operation plans for resolving such issues;

(2) any matters of contention regarding such application; and

(3) any Commission actions regarding the granting or denial of such authorization.

(d) COMMISSION ACTION. The Commission shall consider an application for a construction authorization for all or part of a repository in accordance with the laws applicable to such applications, except that the Commission shall issue a final decision approving or disapproving the issuance of a construction authorization not later ~~than~~ the expiration--

~~(1) January 1, 1989, for the first such application, and January 1, 1992, for the second such application; or~~

~~(2) the expiration~~ of 3 years after the date of the submission of such application, except that the Commission

may extend such deadline by not more than 12 months if, not less than 30 days before such deadline, the Commission complies with the reporting requirements established in subsection e(2) (e)(2), of this section. ~~whichever occurs later.~~ The Commission decision approving the first such application shall prohibit the emplacement in the first repository of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of such a quantity of spent fuel until such time as a second repository is in operation. In the event that a monitored retrievable storage facility, approved pursuant to subtitle C of this Act, shall be located, or is planned to be located, within 50 miles of the first repository, then the Commission decision approving the first such

application shall prohibit the emplacement of a quantity of spent fuel containing in excess of 70,000 metric tons of heavy metal or a quantity of solidified high-level radioactive waste resulting from the reprocessing of spent fuel in both the repository and monitored retrievable storage facility until such time as a second repository is in operation.

(e) PROJECT DECISION SCHEDULE. (1) The Secretary shall prepare and update, as appropriate, in cooperation with all affected Federal agencies, a project decision schedule that portrays the optimum way to attain the operation of the repository ~~involved,~~ within the time period specified in this subtitle. Such schedule shall include a description of objectives and a sequence of deadlines for all Federal agencies required to taken action, including an identification

of the activities in which a delay in the start, or completion, of such activities will cause a delay in beginning repository operation.

(2) Any Federal agency that determines that it cannot comply with any deadline in the project decision schedule, or fails to so comply, shall submit to the Secretary and to the Congress a written report explaining the reason for its failure or expected failure to meet such deadline, the reason why such agency could not reach an agreement with the Secretary, the estimated time for completion of the activity or activities involved, the associated effect on its other deadlines in the project decision schedule, and any recommendations it may have or actions it intends to take regarding any improvements in its operation or organization, or changes to its statutory directives or authority, so

that it will be able to mitigate the delay involved. The Secretary, within 30 days after receiving any such report, shall file with the Congress his response to such report, including the reasons why the Secretary could not amend the project decision schedule to accommodate the Federal agency involved.

(f) ENVIRONMENTAL IMPACT STATEMENT. Any recommendation made by the Secretary under this section shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.). A final environmental impact statement prepared by the Secretary under such Act shall accompany any recommendation to the President to approve a site for a repository.

(2) With respect to the requirements

imposed by the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), compliance with the procedures and requirements of this Act shall be deemed adequate consideration of the need for a repository, the time of the initial availability of a repository, and all alternatives to the isolation of high-level radioactive waste and spent nuclear fuel in a repository.

(3) For purposes of complying with the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 1321 et seq.) and this section, the Secretary need not ~~shall~~ consider ~~as~~ alternate sites to the Yucca Mountain site for the first repository to be developed under this subtitle. ~~3 candidate site with respect to which (1) site characterization has been completed under section 113; and (2) the Secretary has made a preliminary determination,~~

~~that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title. The Secretary shall consider as alternative sites for subsequent repositories at least three of the remaining sites recommended by the Secretary by January 1, 1985, and by July 1, 1989, pursuant to section 10132(b) of this title and approved by the President for site characterization pursuant to section 10132(c) of this title for which (1) site characterization has been completed under section 10133 of this title; and (2) the Secretary has made a preliminary determination that such sites are suitable for development as repositories consistent with the guidelines promulgated under section 10132(a) of this title.~~

(4) Any environmental impact statement

prepared in connection with a repository proposed to be constructed by the Secretary under this part shall, to the extent practicable, be adopted by the Commission in connection with the issuance by the Commission of a construction authorization and license for such repository. To the extent such statement is adopted by the Commission, such adoption shall be deemed to also satisfy the responsibilities of the Commission under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and no further consideration shall be required, except that nothing in this subsection shall affect any independent responsibilities of the Commission to protect the public health and safety under the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.).

(5) Nothing in this Chapter shall be construed to amend or otherwise detract

from the licensing requirements of the Nuclear Regulatory Commission as established in title II of the Energy Reorganization Act of 1974 (42 U.S.C. 5841 et seq.).

(6) In any such statement prepared with respect to the ~~first~~ repository to be constructed under this part, ~~the need for a repository or nongeologic alternatives to the site of such repository shall not be considered.~~ the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or nongeologic alternatives to such site.

REVIEW OF REPOSITORY SITE SELECTION

SEC. 115, 42 U.S.C. 10135. (a)"Resolution of repository siting approval" defined. For purposes of this section, the term "resolution of repository siting approval" means a joint resolution of the

Congress, the matter after the resolving clause of which is as follows: "That there hereby is approved the site at . . . for a repository, with respect to which a notice of disapproval was submitted by . . . on . . . ." The first blank space in such resolution shall be filled with the name of the geographic location of the proposed site of the repository to which such resolution pertains; the second blank space in such resolution shall be filled with the designation of the State Governor and legislature or Indian tribe governing body submitting the notice of disapproval to which such resolution pertains; and the last blank space in such resolution shall be filled with the date of such submission.

(b) STATE OR INDIAN TRIBE PETITIONS. The designation of a site as suitable for application for a construction

authorization for a repository shall be effective at the end of the 60-day period beginning on the date that the President recommends such site to the Congress under section 10134 of this title, unless the Governor and legislature of the State in which such site is located, or the governing body of an Indian tribe on whose reservation such site is located, as the case may be, has submitted to the Congress a notice of disapproval under section 10136 or 10138 of this title. If any such notice of disapproval has been submitted, the designation of such site shall not be effective except as provided under subsection (c) of this section.

(c) CONGRESSIONAL REVIEWS OF PETITIONS. If any notice of disapproval of a repository site designation has been submitted to the Congress under section 10136 or 10138 of this title after a recommendation for approval of such site

is made by the President under section 10134 of this title, such site shall be disapproved unless, during the first period of 90 calendar days of continuous session of the Congress after the date of the receipt by the Congress of such notice of disapproval, the Congress passes a resolution of repository siting approval in accordance with this subsection approving such site, and such resolution thereafter becomes law.

(d) PROCEDURES APPLICABLE TO THE SENATE.

(1) The provisions of this subsection are enacted by the Congress--

(A) as an exercise of the rulemaking power of the Senate, and as such they are deemed a part of the rules of the Senate, but applicable only with respect to the procedure to be followed in the Senate in the case of resolutions of repository siting approval, and such provisions supersede other rules of the Senate only

to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the Senate to change the rules (so far as relating to the procedure of the Senate) at any time, in the same manner and to the same extent as in the case of any other rule of the Senate.

(2)(A) Not later than the first day session following the day on which any notice of disapproval of a repository site selection is submitted to the Congress under section 10136 or 10138 of this title, a resolution of repository siting approval shall be introduced (by request) in the Senate by the chairman of the committee to which such notice of disapproval is referred, or by a Member or Members of the Senate designated by such chairman.

(B) Upon introduction, a resolution of

repository siting approval shall be referred to the appropriate committee or committees of the Senate, by the President of the Senate, and all such resolutions with respect to the same repository site shall be referred to the same committee or committees. Upon the expiration of 60 calendar days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall make its recommendations to the Senate.

(3) If any committee to which is referred a resolution of siting approval introduced under paragraph (2)(A), or, in the absence of such a resolution, any other resolution of siting approval introduced with respect to the site involved, has not reported such resolution at the end of 60 days of

continuous session of Congress after introduction of such resolution, such committee shall be deemed to be discharged from further consideration of such resolution, and such resolution shall be placed on the appropriate calendar of the Senate.

(4)(A) When each committee to which a resolution of siting approval has been referred has reported, or has been deemed to be discharged from further consideration of, a resolution described in paragraph (3), it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) for any Member of the Senate to move to proceed to the consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to

proceed to the consideration of other business. A motion to reconsider the vote by which such motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of such resolution is agreed to, such resolution shall remain the unfinished business of the Senate until disposed of. (B) Debate on a resolution of siting approval, and on all debatable motions and appeals in connection with such resolution, shall be limited to not more than 10 hours, which shall be divided equally between Members favoring and Members opposing such resolution. A motion further to limit debate shall be in order and shall not be debatable. Such motion shall not be subject to amendment, to a motion to postpone, or to a motion to proceed to the consideration of other business, and a motion to recommit such resolution shall not be in

order. A motion to reconsider the vote by which such resolution is agreed to or disagreed to shall not be in order.

(C) Immediately following the conclusion of the debate on a resolution of siting approval, and a single quorum call at the conclusion of such debate if requested in accordance with the rules of the Senate, the vote on final approval of such resolution shall occur.

(D) Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a resolution of siting approval shall be decided without debate.

(5) If the Senate receives from the House a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the House with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the Senate with respect to such site--

(i) the procedure with respect to that or other resolutions of the Senate with respect to such site shall be the same as if no resolution from the House with respect to such site had been received; but

(ii) on any vote on final passage of a resolution of the Senate with respect to such site, a resolution from the House with respect to such site where the text is identical shall be automatically substituted for the resolution of the Senate.

(e) PROCEDURES APPLICABLE TO THE HOUSE OF REPRESENTATIVES.

(1) The provisions of this section are enacted by the Congress--

(A) as an exercise of the rulemaking power of the House of Representatives, and as such they are deemed a part of the

rules of the House, but applicable only with respect to the procedure to be followed in the House in the case of resolutions of repository siting approval, and such provisions supersede other rules of the House only to the extent that they are inconsistent with such other rules; and

(B) with full recognition of the constitutional right of the House to change the rules (so far as relating to the procedure of the House) at any time, in the same manner and to the same extent as in the case of any other rule of the House.

(2) Resolutions of repository siting approval shall upon introduction, be immediately referred by the Speaker of the House to the appropriate committee or committees of the House. Any such resolution received from the Senate shall be held at the Speaker's table.

(3) Upon the expiration of 60 days of continuous session after the introduction of the first resolution of repository siting approval with respect to any site, each committee to which such resolution was referred shall be discharged from further consideration of such resolution, and such resolution shall be referred to the appropriate calendar, unless such resolution or an identical resolution was previously reported by each committee to which it was referred.

(4) It shall be in order for the Speaker to recognize a Member favoring a resolution to call up a resolution of repository siting approval after it has been on the appropriate calendar for 5 legislative days. When any such resolution is called up, the House shall proceed to its immediate consideration and the Speaker shall recognize the Member calling up such resolution and a

Member opposed to such resolution for 2 hours of debate in the House, to be equally divided and controlled by such Members. When such time has expired, the previous question shall be considered as ordered on the resolution to adoption without intervening motion. No amendment to any such resolution shall be in order, nor shall it be in order to move to reconsider the vote by which such resolution is agreed to or disagreed to.

(5) If the House receives from the Senate a resolution of repository siting approval with respect to any site, then the following procedure shall apply:

(A) The resolution of the Senate with respect to such site shall not be referred to a committee.

(B) With respect to the resolution of the House with respect to such site--

(i) the procedure with respect to that or other resolutions of the House with

respect to such site shall be the same as if no resolution from the Senate with respect to such site had been received; but

(ii) on any vote on final passage of resolution of the House with respect to such site, a resolution from the Senate with respect to such site where the text is identical shall be automatically substituted for the resolution of the House.

(f) COMPUTATION OF DAYS. For purposes of this section--

(1) continuity of session of Congress is broken only by an adjournment sine die; and

(2) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 90-day period referred to in subsection (c) of this section and the 60-day period

referred to in subsections (d) and (e) of this section.

(g) INFORMATION PROVIDED TO CONGRESS. In considering any notice of disapproval submitted to the Congress under section 10136 or 10138 of this title, the Congress may obtain any comments of the Commission with respect to such notice of disapproval. The provision of such comments by the Commission shall not be construed as binding the Commission with respect to any licensing or authorization action concerning the repository involved.

PARTICIPATION OF STATES

SEC. 116, 42 U.S.C. 10136.

(a)NOTIFICATION OF STATES AND AFFECTED TRIBES. The Secretary shall identify the States with one or more potentially acceptable sites for a repository within 90 days after January 7, 1983. Within 90 days of such identification, the

Secretary shall notify the Governor, the State legislature, and the tribal council of any affected Indian tribe in any State of the potentially acceptable sites within such State. For the purposes of this subchapter, the term "potentially acceptable site" means any site at which, after geologic studies and field mapping but before detailed geologic data gathering, the Department undertakes preliminary drilling and geophysical testing for the definition of site location.

(b) STATE PARTICIPATION IN REPOSITORY SITING DECISIONS. (1) Unless otherwise provided by State law, the Governor or legislature of each State shall have authority to submit a notice of disapproval to the Congress under paragraph (2). In any case in which State law provides for submission of any such notice of disapproval by any other

person or entity, any reference in this subtitle to the Governor or legislature of such State shall be considered to refer instead to such other person or entity.

(2) Upon the submission by the President to the Congress of a recommendation of a site for a repository, the Governor or legislature of the State in which such site is located may disapprove the site designation and submit to the Congress a notice of disapproval. Such Governor or legislature may submit such notice of disapproval to the Congress not later than the 60 days after the date that the President recommends such site to the Congress under section 10134 of this title. A notice of disapproval shall be considered to be submitted to the Congress on the date of the transmittal of such notice of disapproval to the Speaker of the House and the President

pro tempore of the Senate. Such notice of disapproval shall be accompanied by a statement of reasons explaining why such Governor or legislature disapproved the recommended repository site involved.

(3) The authority of the Governor or legislature of each State under this subsection shall not be applicable with respect to any site located on a reservation.

(c) FINANCIAL ASSISTANCE. (1)(A) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State notified under subsection (a) of this section~~ for the purpose of participating in activities required by this section and section 10137 of this title or authorized by written agreement entered into pursuant to subsection 10137(c) of this title. Any salary or travel expense that would ordinarily be incurred by such State, or

by any political subdivision of such State, may not be considered eligible for funding under this paragraph.

(B) The Secretary shall make grants to the State of Nevada and any affected unit of local government ~~each State in which a candidate site for a repository is approved under section 10132(c) of this title. Such grants may be made to each such State only~~ for purposes of enabling such State or affected unit of local government--

(i) to review activities taken under this subtitle with respect to the Yucca Mountain ~~such~~ site for purposes of determining any potential economic, social, public health and safety, and environmental impacts of such repository on such ~~the~~ State or affected unit of local government and its residents;

(ii) to develop a request for impact

assistance under paragraph (2);

(iii) to engage in any monitoring, testing, or evaluation activities with respect to site characterization programs with regard to such site;

(iv) to provide information to its residents regarding any activities of such State, the Secretary, or the Commission with respect to such site; and

(v) to request information from, and make comments and recommendations to, the Secretary regarding any activities taken under this subtitle with respect to such site.

(C) Any salary or travel expense that would ordinarily be incurred by the State of Nevada or any affected unit of local government ~~such State, or by any political subdivision of such State,~~ may not be considered eligible for funding

under this paragraph.

2)(A)(i) The Secretary shall provide financial and technical assistance to the State of Nevada, and any affected unit of local government ~~any State~~ requesting such assistance ~~in which there is a site with respect to which the Commission has authorized construction of a repository~~.

(ii) Such assistance shall be designed to mitigate the impact on such State or affected unit of local government of the development of such repository and the characterization of such site.

(iii) Such assistance to such State or affected unit of local government shall commence ~~within 6 months following the granting by the Commission of a construction authorization for such repository and following~~ upon the initiation of site characterization ~~construction~~

activities ~~at such site~~.

(B) The State of Nevada and any affected unit of local government may request assistance under this subsection by preparing and submitting to the Secretary a report on the economic, social, public health and safety, and environmental impacts that are likely to result from site characterization activities at the Yucca Mountain site. Such report shall be submitted to the Secretary after the Secretary has submitted to the State a general plan for site characterization activities under section 10133(b) of this title. ~~Any State desiring assistance under this paragraph shall prepare and submit to the Secretary a report on any economic, social, public health and safety, and environmental impacts that are likely as a result of the development of a repository at a site in such State. Such report shall be submitted to the~~

~~Secretary following the completion of site characterization activities at such site and before the recommendation of such site to the President by the Secretary for application for a construction authorization for a repository. As soon as practicable following the granting of a construction authorization for such repository, the Secretary shall seek to enter into a binding agreement with the State involved setting forth the amount of assistance to be provided to such State under this paragraph and the procedures to be followed in providing such assistance~~.

(C) As soon as practicable after the Secretary has submitted such site characterization plan, the Secretary shall seek to enter into a binding agreement with the State of Nevada setting forth--

(i) the amount of assistance to be

provided under this subsection to such State or affected unit of local government; and

(ii) the procedures to be followed in providing such assistance.

(3)(A) In addition to financial assistance provided under paragraphs (1) and (2), the Secretary shall ~~also~~ grant to ~~each State and~~ the State of Nevada and any affected unit of ~~general~~ local government ~~in which a site for a repository is approved under section 10132(c) of this title~~ an amount each fiscal year equal to the amount such State or affected unit of local government, respectively, would receive ~~were they~~ if authorized to tax site characterization activities at such site, and the development and operation of such repository, as such State ~~and~~ or affected unit of local government ~~tax~~ taxes the ~~other~~ non-Federal real property and

industrial activities occurring within such State ~~and~~ or affected unit of ~~general~~ local government. (B) Such grants shall continue until such time as all such activities, development, and operation are terminated at such site.

(4)(A) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any grant under paragraph (1) after the expiration of the 1-year period following--

(i) the date on which the Secretary notifies the Governor and legislature of the State of Nevada of the termination of site characterization activities at the ~~candidate~~ site ~~involved~~ in such State;

(ii) the date on which the Yucca Mountain site ~~in such State~~ is disapproved under section 10135 of this title; or

(iii) the date on which the Commission disapproves an application for a construction authorization for a repository at such site;

whichever occurs first. ~~unless there is another candidate site in the State approved under section 10132(c) of this title with respect to which the actions described in clauses (i), (ii), and (iii) have not been taken~~.

(B) ~~A State~~ The State of Nevada or any affected unit of local government may not receive any further assistance under paragraph (2) with respect to a site if repository construction activities or site characterization activities at such site are terminated by the Secretary or if such activities are permanently enjoined by any court.

(C) At the end of the 2-year period beginning on the effective date of any

license to receive and possess for a repository in a State, no Federal funds, shall be made available to such State or affected unit of local government under paragraph (1) or (2), except for--

(i) such funds as may be necessary to support ~~State~~ activities related to any other repository located in, or proposed to be located in, such State, and for which a license to receive and possess has not been in effect for more than 1 year;

(ii) such funds as may be necessary to support State activities pursuant to agreements or contracts for impact assistance entered into, under paragraph (2), by such State with the Secretary during such 2-year period; and

(iii) such funds as may be provided under an agreement entered into under title IV of this chapter.

(5) Financial assistance authorized in this subsection shall be made out of amounts held in the Nuclear Waste Fund ~~established in section 10222 of this title~~.

(6) No State, other than the State of Nevada, may receive financial assistance under this subsection after the date of the enactment of the Nuclear Waste Policy Amendments Act of 1987.

(d) ADDITIONAL NOTIFICATION AND CONSULTATION. Whenever the Secretary is required under any provision of this Chapter to notify or consult with the governing body of an affected Indian tribe where a site is located, the Secretary shall also notify or consult with, as the case may be, the Governor of the State in which such reservation is located.

JUDICIAL REVIEW OF AGENCY ACTIONS

SEC. 119, 42 U.S.C. 10139.

(a)JURISDICTION OF UNITED STATES COURTS OF APPEALS. (1) Except for review in the Supreme Court of the United States, the United States courts of appeals shall have original and exclusive jurisdiction over any civil action--

(A) for review of any final decision or action of the Secretary, the President, or the Commission under this part;

(B) alleging the failure of the Secretary, the President, or the Commission to make any decision, or take any action, required under this part;

(C) challenging the constitutionality of any decision made, or action taken, under any provision of this part;

(D) for review of any environmental impact statement prepared pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) with respect to any action under this part, or as required under section 10135(c)(1) of

this title, or alleging a failure to prepare such statement with respect to any such action;

(E) for review of any environmental assessment prepared under section 10132(b)(1) or 10135(c)(2) of this title; or

(F) for review of any research and development activity under subchapter II of this chapter.

(2) The venue of any proceeding under this section shall be in the judicial circuit in which the petitioner involved resides or has its principal office, or in the United States Court of Appeals for the District of Columbia.

(c) DEADLINE FOR COMMENCING ACTION. A civil action for judicial review described under subsection (a)(1) of this section may be brought not later than the 180th day after the date of the decision or action or failure to act involved, as

the case may be, except that if a party shows that he did not know of the decision or action complained of (or of the failure to act), and that a reasonable person acting under the circumstances would not have known, such party may bring a civil action not later than the 180th day after the date such party acquired actual or constructive knowledge of such decision, action, or failure to act.

SUBTITLE E--REDIRECTION OF THE NUCLEAR WASTE PROGRAM

SELECTION OF YUCCA MOUNTAIN SITE

SEC. 160, 42 U.S.C 10172 (a) IN GENERAL. (1) The Secretary shall provide for an orderly phase-out of site specific activities at all candidate sites other than the Yucca Mountain site.

(2) The Secretary shall terminate all site specific activities (other than reclamation activities) at all candidate

sites, other than the Yucca Mountain site, within 90 days after December 22, 1987.

(b) Effective on December 22, 1987, the State of Nevada shall be eligible to enter into a benefits agreement with the Secretary under section 10173 of this title.

ENVIRONMENTAL IMPACT STATEMENT

SEC. 407. 42 U.S.C. 10247 (a) IN GENERAL. Issuance of a construction authorization for a repository or monitored retrievable storage facility under section 10245(b) of this title shall be considered a major Federal action significantly affecting the quality of the human environment for purposes of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) PREPARATION. A final environmental impact statement shall be prepared by the Secretary under such Act and shall

accompany any application to the Nuclear Regulatory Commission for a construction authorization.

(c) ADOPTION. (1) Any such environmental impact statement shall, to the extent practicable, be adopted by the Nuclear Regulatory Commission, in accordance with section 1506.3 of title 40, Code of Federal Regulations, in connection with the issuance by the Nuclear Regulatory Commission of a construction authorization and license for such repository or monitored retrievable storage facility.

(2)(A) In any such statement prepared with respect to a repository to be constructed under this title at the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, alternate sites to the Yucca Mountain site, or

nongeologic alternatives to such site.

(B) In any such statement prepared with respect to a repository to be constructed under this title at a site other than the Yucca Mountain site, the Nuclear Regulatory Commission need not consider the need for a repository, the time of initial availability of a repository, or nongeologic alternatives to such site but shall consider the Yucca Mountain site as an alternate to such site in the preparation of such statement.

FEDERAL LAND POLICY & MANAGEMENT ACT

SECTION 204, 43 U.S.C. §1714(a)(b)(c)(d)

Withdrawals of lands:

(a) Authorization and limitation; delegation of authority

On and after the effective date of this Act the Secretary is authorized to make, modify, extend, or revoke withdrawals but only in accordance with the provisions

and limitations of this section. The Secretary may delegate this withdrawal authority only to individuals in the Office of the Secretary who have been appointed by the President, by and with the advice and consent of the Senate.

(b) Application and procedures applicable subsequent to submission of application

(1) Within thirty days of receipt of an application for withdrawal, and whenever he proposes a withdrawal on his own motion, the Secretary shall publish a notice in the Federal Register stating that the application has been submitted for filing or the proposal has been made and the extent to which the land is to be segregated while the application is being considered by the Secretary. Upon publication of such notice the land shall be segregated from the operation of the public land laws to the extent specified

in the notice. The segregative effect of the application shall terminate upon (a) rejection of the application by the Secretary, (b) withdrawal of lands by the Secretary, or (c) the expiration of two years from the date of the notice.

(2) The publication provisions of this subsection are not applicable to withdrawals under subsection (e) hereof.

(c) Congressional approval procedures applicable to withdrawals aggregating five thousand acres or more

(1) On and after October 21, 1976, a withdrawal aggregating five thousand acres or more may be made (or such a withdrawal or any other withdrawal involving in the aggregate five thousand acres or more which terminates after such date of approval may be extended) only for a period of not more than twenty years by the Secretary on his own motion or upon request by a department or agency

head. The Secretary shall notify both Houses of Congress of such a withdrawal no later than its effective date and the withdrawal shall terminate and become ineffective at the end of ninety days (not counting days on which the Senate or the House of Representatives has adjourned for more than three consecutive days) beginning on the day notice of such withdrawal has been submitted to the Senate and the House of Representatives, if the Congress has adopted a concurrent resolution stating that such House does not approve the withdrawal. If the committee to which a resolution has been referred during the said ninety day period, has not reported it at the end of thirty calendar days after its referral, it shall be in order to either discharge the committee from further consideration of such resolution or to discharge the committee from consideration of any other

resolution with respect to the Presidential recommendation. A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported such a resolution), and debate thereon shall be limited to not more than one hour, to be divided equally between those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to. If the motion to discharge is agreed to or disagreed to, the motion may not be made with respect to any other resolution with respect to the same Presidential recommendation. When the committee has reprinted, or has been discharged from further consideration of a resolution, it shall at any time

thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion was agreed to or disagreed to.

(2) With the notices required by subsection (c)(1) of this section and within three months after filing the notice under subsection (e) of this section, the Secretary shall furnish to the committees--

(1) a clear explanation of the proposed use of the land involved which led to the withdrawal;

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public

and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, local communities, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination;

(5) an analysis of the manner in which such lands will be used in relation to the specific requirements for the

proposed use;

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and local government bodies, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and local government interests and the regional economy;

(9) a statement of the expected length of time needed for the withdrawal;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on

the withdrawal can be examined by interested parties; and

(12) a report prepared by a qualified mining engineer, engineering geologist, or geologist which shall include but not be limited to information on: general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, present and potential market demands.

(d) Withdrawals aggregating less than five thousand acres; procedure applicable

A withdrawal aggregating less than five thousand acres may be made under this subsection by the Secretary on his own motion or upon request by a department or an agency head--

(1) for such period of time as he deems desirable for a resource use; or

(2) for a period of not more than twenty years for any other use, including but not limited to use for administrative sites, location of facilities, and other proprietary purposes; or

(3) for a period of not more than five years to preserve such tract for a specific use then under consideration by the Congress.

SECTION 507, 43 U.S.C. § 1767

Rights-of-way for Federal departments and agencies

(a) The Secretary concerned may provide under applicable provisions of this subchapter for the use of any department or agency of the United States a right-of-way over, upon, under or through the land administered by him, subject to such terms and conditions as he may impose.

(b) Where a right-of-way has been reserved for the use of any department or

agency of the United States, the Secretary shall take no action to terminate, or otherwise limit, that use without the consent of the head of such department or agency.

FEDERAL REGULATIONS

10 C.F.R. 60.2 DEFINITIONS

"High-level radioactive waste" or "HLW" means: (1) Irradiated reactor fuel, (2) liquid wastes resulting from the operation of the first cycle solvent extraction system, or equivalent, and the concentrated wastes from subsequent extraction cycles, or equivalent, in a facility for reprocessing irradiated reactor fuel, and (3) solids into which such liquid wastes have been converted.

10 C.F.R. 60.121

LAND OWNERSHIP AND CONTROL

Requirements for ownership and control of

interests in land.

(a) *Ownership of land.* (1) Both the geologic repository operations area and the controlled area shall be located in and on lands that are either acquired lands under the jurisdiction and control of DOE, or lands permanently withdrawn and reserved for its use.

(2) These lands shall be held free and clear of all encumbrances, if significant, such as: (i) Rights arising under the general mining laws; (ii) easements for right-of-way; and (iii) all other rights arising under lease, rights of entry, deed, patent, mortgage, appropriation, prescription, or otherwise.

(b) *Additional controls.* Appropriate controls shall be established outside of the controlled area. DOE shall exercise any jurisdiction and control over surface and subsurface estates necessary to

prevent adverse human actions that could significantly reduce the geologic repository's ability to achieve isolation. The rights of DOE may take the form of appropriate possessory interests, servitudes, or withdrawals from location or patent under the general mining laws.

(c) *Water rights.* (1) DOE shall also have obtained such water rights as may be needed to accomplish the purpose of the geologic repository operations area.

(2) Water rights are included in the additional controls to be established under paragraph (b) of this section.

NEVADA STATUTES AND RESOLUTIONS

NEVADA REVISED STATUTE

NRS 328.065:

Application to state for cession of jurisdiction, appropriation of water or consent to use public land or close

public road. An officer of any agency or instrumentality of the United States:

1. May apply to the director of the legislative counsel bureau pursuant to NRS 328.065 to 328.135, inclusive, to obtain a cession of concurrent criminal jurisdiction or other jurisdiction from the State of Nevada.

2. Shall apply to the state engineer pursuant to Title 48 of NRS to appropriate water on the public lands or other federal lands of this state. The state engineer has continuing jurisdiction over any acquisition by the United States of the waters of the State of Nevada, whether by purchase, gift, condemnation, appropriation pursuant to the state's water laws or otherwise, and whether appurtenant to lands acquired by or retained by the United States.

3. Shall apply to the department of transportation pursuant to the procedure

set forth in NRS 408.537, 408.543 and 408.547 for consent to close a public road, as defined in NRS 406.191, which is located on the public lands of this state.

4. Shall apply to the state land use planning agency pursuant to the procedure set forth in NRS 321.736 to 321.739, inclusive, for consent to use land held solely for proprietary purposes relating to the retention and management of the public lands, if that use interferes with the sovereignty of this state respecting the land within its borders.

NRS 328.500(2):

Attorney general may bring, maintain or intervene in actions concerning public lands to protect sovereignty of state.

1. The legislature finds that more than 87 percent of the land in the State of Nevada is held by the Federal

Government, of which 69 percent is public land, and the actions of federal agencies and instrumentalities involving the public lands and waters appurtenant to and public roads over those lands significantly affect the health, safety, welfare and happiness of the citizens of this state and may interfere with the traditional sovereign functions of the State of Nevada with respect to those lands, waters and roads and their uses.

2. Except as provided in subsection 3, the attorney general may:

(a) On his own initiative or at the request of the governor or any state agency, bring and maintain any action; or

(b) Intervene on behalf of or bring and maintain an action on the relation of, any person in any meritorious case, in any court or before any federal agency if any action or proposed action by a

federal agency or instrumentality with respect to the public lands or waters appurtenant to or public roads over those lands impairs or tends to impair the sovereignty of the State of Nevada.

NRS 459.910:

Unlawful to store high-level radioactive waste in state.

1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.

2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

RESOLUTIONS

ASSEMBLY JOINT RESOLUTION NO. 4.

WHEREAS, Because of the extremely dangerous nature of high-level nuclear waste and the persistence of that danger

for an extended period, the location of such waste in a repository in this state poses a serious hazard to the health and welfare of Nevadans; and

WHEREAS, The residents of the State of Nevada are overwhelmingly opposed to permitting Nevada to become the dumping ground for nuclear waste generated in other states and foreign countries; now, therefore be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Nevada Legislature expresses its adamant opposition to the placement of a high-level nuclear waste repository in the State of Nevada; and be it further

RESOLVED, That a copy of this resolution be transmitted forthwith by the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the

House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.

ASSEMBLY JOINT RESOLUTION NO. 6.

WHEREAS, On December 22, 1987, Congress enacted the Nuclear Waste Policy Amendments Act of 1987, specifying Yucca Mountain, Nevada, as the sole location for evaluation as a suitable site for the placement of a national repository for high-level radioactive waste; and

WHEREAS, The Nuclear Waste Policy Amendments Act of 1987 represents just one of the many instances of federal overreaching with regard to the public land in this state; and

WHEREAS, The Federal Government claims ownership of approximately 87 percent of the total land in the State of Nevada,

and has targeted that land for certain undesirable federal programs; and

WHEREAS, The placement of a repository for high-level radioactive waste in the State of Nevada poses serious concerns about the transportation and storage of such waste and the potential harm to the environment and health of the residents and guests of this state; and

WHEREAS, The Nevada economy is dependent upon tourism and the perception of a safe environment; and

WHEREAS, The United States has a duty to protect the economy, environment and public health of this state, which the Nevada Legislature is empowered to protect and preserve; and

WHEREAS, The Federal Government has refused to assume full liability for any deleterious effects that could result from the placement of a repository for high-level radioactive waste in Nevada;

and

WHEREAS, Various polls of the people of this state, including our children in school, demonstrate an over whelming opposition to the location of a repository for high-level radioactive waste at Yucca Mountain; now, therefore, be it

RESOLVED BY THE ASSEMBLY AND SENATE OF THE STATE OF NEVADA, JOINTLY, That the Federal Government, its agencies and instrumentalities shall not establish a repository for high-level radioactive waste at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to chapter 328 of the Nevada Revised Statutes, which consent and cession are hereby refused; and be it further

RESOLVED, That copies of this resolution be prepared and transmitted forthwith by

the Chief Clerk of the Assembly to the President of the United States, the Vice President of the United States as the presiding officer of the Senate, the Speaker of the House of Representatives and to each member of the Nevada Congressional Delegation; and be it further

RESOLVED, That this resolution becomes effective upon passage and approval.